NOV 9 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM A. D. 1953.

No. 460

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Petitioner.

vs.

BEN C. DAVENPORT, HARRY A. HAMMIL AND DAILEY BROTHERS CIRCUS, a partnership,

Respondents.

PETITION FOR A WRIT OF CERTIORARI, TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DRENNAN J .SLATER,
400 West Madison Street,
Chicago 6, Illinois.
AMOS M. MATHEWS,
The Association of Western Railways,
280 Union Station Bldg.,
Chicago 6, Illinois.
ARTHUR P. BAGBY,
J. SAM WINTERS,
Brown Building,
Austin, Texas.
Attorneys for Petitioner.

GERALD M. CHAPMAN,
Of Counsel.

Midwest Law Printing Co., - 326 N. Michigan Ave., Chicago

INDEX.

	PAGE
Opinions Below	2
Jurisdiction	2
Question Presented	2
Rules Involved	3
Statement	3
Specification of Errors Relied On	9
Reasons for Granting the Writ	10
Conclusion	26
Appendix A	28
Appendix B	30

CITATIONS.

Cases:

A. T. & S. F. R. Co. v. State (Okla.), 206 Pac. 252 .. 18

Baltimore & O. Ry. Co. v. Voight, 176 U. S. 498, 513 (1899) 15

Bernardi Greater Shows v. Boston & Maine R. R. Co., 86 N. H. 146, 165 Atl. 124 (1933) 10, 13, 18

Bernardi Greater Shows v. Boston & Maine R. R. Co., 89 N. H. 490, 1 A. (2d) 360 .....16, 21

Boston Woven Hose Co. v. Kendall, 178 Mass. 232, 59 N.E. 657 24

Campbell River Mills Co. v. Chicago, M. & St. P. R. Co., 42 F. (2d) 775 (W.D. Wash., 1930) 19

Campbell Soup Co. v. Wentz, 172 F. (2d) 80, 82 (C.A. 3rd, 1949) 20
Chappelle v. Louisville & N. R. R. Co., 19 I. C. C. 56, 19 I. C. C. 456 21
Chicago etc. R. Co. v. Hamler, 215 Ill. 525, 74 N.E. 705 16
Chicago, M. & St. P. R. Co. v. Wallace, 66 Fed. 506 (C.A. 7th, 1895) 10
City of Lake View v. MacRitchie, 134 Ill. 203 (1890) 24
Cleveland etc. R. Co. v. Henry, 170 Ind. 94, 83 N.E. 710 16
Clough v. Grand Trunk Western Ry. Co., 155 Fed. 81 (C.A. 6th, 1907) 10
Coma v. St. Louis-San Francisco Ry. Co., 74 I. C .C. 400 (1922) 17, 21, 25
Coup v. Wabash etc. R. Co., 56 Mich. 111, 22 N.W. 215 16
Dice v. Akron, Canton & Youngstown R. Co., 342 U. S. 359 25
Erie R. Co. v. Tompkins, 304 U. S. 64 25
Forespaugh v. Delaware etc. Ry. Co., 128 Pa. 217, 18 Atl. 503 16
Fritz v. Jarecki, 189 F. (2d) 445, (C.A. 7th, 1951) .. 20
Garrett v. Moore-McCormack Co., 317 U. S. 239 26
Gracie v. Palmer, 8 Wheat. 605, 633 (21 U. S.) 14
Hissem v. Guran, 112 Ohio St. 59, 146 N.E. 808 19
In the Matter of Party Rate Tickets, 12 I. C. C. 96, 101 (1907) 25
Jackson Architectural Iron Works v. Huntbut, 158 N. Y. 34, 52 N.E. 665 19

Jacksonville Bus Line Co. v. Watson, 349 Ill. App. 462 19
Larson v. Aetna Life Ins. Co., 19 Wash. (2d) 601, 143 P. (2d) 850 19
London Gurantee & Accident Co. v. Strait Scale Co., 322 Mo. 502, 15 N.E. 766 24
Maucher v. Chicago, I. & P. R. Co., 100 Neb. 237, 159 N.W. 422 18
M'Cree v. Davis, 280 Fed. 959 (C.A. 6th, 1922) ..10, 13, 21
Mowbray v. Merryweather, 2 Q. B. 640 (1895) 24
Orvis v. Higgins, 180 F. (2d) 537, 539 (C.A. 2nd, 1950) 20
People v. Duntley, 217 Cal. 150, 17 P. (2d) 715 19
Petroleum Rail Shippers Assn. v. Alton & S. R., 243 I. C. C. 589, 620 (1941) 21
Propeller Niagara v. Cordes, 21 How. (62 U. S.) 7 (1858) 15
Robertson v. Old Colony Railroad Company, 156 Mass. 525, 31 N.E. 650 16
Rutledge Co-Op. Ass'n v. Baughman, 138 Atl. 29, 153 Md. 297 19
Sabol v. Chicago & N. W. Ry. Co., 225 Mich. 548, 238 N.W. 281 16
Sager v. Northern Pacific Ry. Co., 166 Fed. 526 (D. C.) 16
Sante Fe & P. R. Co. v. Grant Bros. Construction Co., 228 U. S. 177 .....11, 15
Sartoris v. Utah Construction Co., 21 F. (2d) 1, (C.A. 9th, 1927) 24
Sasinowski v. Boston & Maine R. R. Co., 74 F. (2d) 628, (C.A. 1st, 1935) 10, 12, 18

Southern Pacific Co. v. State of Arizona, 249 U. S. 472 17
State ex rel Board of Railroad Com'rs. v. Rosenstein, 217 Iowa 985, 252 N.W. 251 19
Tap Line Cases, 234 U. S. 1 (1913) 15
The Lady Pike, 21 Wal. (88 U. S.) 1, 14 (1874) 15
United States v. Interstate Commerce Commission, 288 Fed. 649, 654 (C.A., D. C. 1923) 20
Western Union Telegraph Co. v. Call Publishing Co., 181 U. S. 92 25
Wilson v. Atlantic Coast Line R. Co., 129 Fed. 744 (N. D. Ga., 1904) Aff'd. 133 Fed. 1022 (C.A. 5th (1904) cert. den. 198 U. S. 585 .....10, 16

Statutes:

Federal Employers' Liability Act, 45 U. S. C., Sec. 51 et seq. 3
Judicial Code, 28 U. S. C., Sec. 1254(1) 2
Judicial Code, 28 U. S. C., Sec. 2101(c) 2
Interstate Commerce Act, Part I, 49 U. S. C., Sec. 20 .....11, 19
Interstate Commerce Act, Part I, 49 U. S. C., Sec. 1 23
Interstate Commerce Act, Part II, 49 U. S. C., Sec. 203(15) 23
Interstate Commerce Act, Part II, 49 U. S. C., Sec. 204 23

Rules:

Rule 63 I. C. C. Tariff Circular No. 18 .....3, 13, 22
Rule 63 I. C. C. Tariff Circular No. 20 .....
.....3, 5, 9, 10, 13, 21

Miscellaneous:

Restatement Contracts 23
Traffic World, Vol. 92, No. 15, P. 60 26
Williston, Contracts (Rev. ed.) 23

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM A. D. 1953.

No.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation,

Petitioner.

vs.

BEN C. DAVENPORT, HARRY A. HAMMIL AND DAILEY BROTHERS CIRCUS, a partnership,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on June 26, 1953, and the order denying the petition for rehearing in said cause entered on August 11, 1953.

Opinions Below.

The District Court for the Central District of Iowa rendered two written opinions, reported at 94 F. Supp. 83 and 95 F. Supp. 469, dealing with the proper venue for this action. The findings of fact and conclusions of law of the District Court for the Western District of Texas, Austin Division, are unreported, and that court rendered no written opinion on the merits. The opinion of the majority of the Court of Appeals for the Fifth Circuit is reported at 205 F. (2d) 589. Judge Strum did not file a dissenting opinion.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on July 26, 1953 and a petition for rehearing was duly filed thereafter and denied on August 11, 1953. This petition is filed within ninety days from the denial of said petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) and 28 U. S. C. § 2101 (c).

Question Presented.

The circus haulage contracts in evidence in this case provide for the hauling of trains wholly composed of cars owned by the circus, loaded by it with a heterogeneous mixture of wild animals, circus impedimentia and circus employee personnel and moved according to unique routing and scheduling specified by the circus.

Does a railroad become a common carrier of circuses by entering into such individual and special contracts from time to time and filing them with the Interstate Commerce Commission?

Rules Involved.

In its decision, the Court of Appeals relied heavily upon petitioner's compliance with Rule 63, Tariff Circular 20, of the Interstate Commerce Commission and a comparison of that rule with a similar rule applicable to motor vehicles for its determination that petitioner was a common carrier. The texts of these two rules, together with a significant earlier version of Rule 63, appear in Appendix A, *infra*.

Statement.

Petitioner brought this action to recover $31,349.16, being the amount it paid in settlement of a claim under the Federal Employers' Liability Act (45 U.S.C. § 51, et seq.). The claim arose out of an injury to one of petitioner's employees, Chester Hugunin, caused by a defect in a railroad car belonging to respondents and moving over petitioner's line. Respondents' liability was predicated upon the provisions of a contract under which the car in question was being transported (R. 2-17; 31-41). Respondents' answers questioned both the validity and petitioner's construction of this contract (R. 17-28; 41-45).

Respondents are a partnership consisting of Harry A. Hammil and Ben C. Davenport (R. 130), doing business as Dailey Brothers Circus and operating a road show or circus, traveling in twenty-five railroad cars owned by Lone Star Circus Properties and leased to respondents. The show traveled from its winter quarters at Gonzales, Texas, northward to Canada. From there it re-entered the United States in August of 1950, intending to play various towns in the states of Michigan and Wisconsin. In furtherance of this intention, respondents

negotiated a contract at Chicago, Illinois, dated July 20, 1950, providing for the hauling of respondents' circus train over petitioner's lines between August 10th and August 26th, 1950, (R. 130). This contract is reproduced at pages 8 through 14 of the record. The provisions of this contract material to the determination of this case (Sections 1, 3 and 6) are reproduced in Appendix B, *infra*. Section 1 recites the mutual understanding of the parties that the petitioner was not a common carrier of circuses, and that the contract was executed by petitioner as a special carrier only. Insofar as is material, section 3 provided that respondents would maintain their equipment in good condition and provide it with all devices required by law. Section 6 provided that the employees of the railroad should be deemed to be the employees of the circus while engaged in the employment contemplated by the contract. It also provided that respondents would indemnify petitioner for any liability to any person for injury or damage arising from any cause whatsoever.

The only testimony concerning negotiations for haulage contracts was that of respondents Davenport and Hammil. Davenport testified that he knew of two railroads who would not accept circus trains, but could not say whether or not petitioner had ever solicited circus business, (R. 78). He further testified that every railroad requires a separate contract for the haulage of circus trains, and that all railroads used substantially the same form of contract (R. 80-81). Rate contracts are individually made for a stipulated price set up by the railroads, with a minimum charge for a 50-mile run (R. 72-73). The routing of circus trains is especially arranged, and railroads usually do not like

to accept circus contracts unless they can arrange for 8 or 10 stops during the course of a haul over a given line. The routing is determined by the circus on the basis of its opinion as to where the show would draw an audience (R. 71). Respondent Davenport stated that circuses would sign any kind of a contract to get these cars hauled over the railroad line (R. 80).

An examination of the contract shows that it provides for the haulage of a train consisting of designated cars between two points with the privilege of stopping in transit at points designated in the contract. It also provides for track storage of the cars, and for special spotting of the so-called "Treasurer's car". It further provides for a very definite schedule, and usually for midnight departures (R. 8-14).

Eleven similar contracts were introduced in evidence, all of which were identical in form with the contract here except that they covered the shipment of different circuses between different points at different times. One of these contracts had been filed with the Michigan Public Service Commission and ten of them had been filed with the Wisconsin Public Service Commission. Some of them, in addition, had been filed with the Interstate Commerce Commission. Those filed with the Interstate Commerce Commission bore in part the following language (R. 108-122):

> "Issued under authority of Rule 63, Tariff Circular 20, Interstate Commerce Commission."

Pursuant to this contract, respondents' circus train moved over petitioner's line from Ishpeming, Michigan, and, on August 16, 1950 at about 9 o'clock in the morning, entered Antigo, Wisconsin. One of petitioner's employees, Chester Hugunin, acting in the course of his

employment as a switchman, climbed car No. 83, one of the cars contained in respondents' train, and fell when the grabiron located on the roof thereof came loose because it was insecurely attached. A visual inspection by Chester Hugunin did not, and could not, reveal the fact that this grabiron was insecurely fastened to the car (R. 130-132). The circus train was inspected by petitioner at Green Bay, Wisconsin, just prior to its movement to Antigo, at which time two inspectors examined it from the ground and one from the top, none of whom noted any defect in car No. 83 (R. 125).

Hugunin asserted a claim for personal injuries arising out of this accident against the petitioner under the Federal Employers' Liability Act (R. 48). Believing itself protected by respondents under the terms of the special carrier agreement, petitioner gave notice of liability over and tendered defense of such claim to respondents, who wholly failed and refused to accept defense thereof and flatly denied liability (R. 49).

After instituting this suit for declaratory judgment as to the liability of respondents under the contract, petitioner settled Hugunin's claim on March 24, 1952, by paying to him and for his use and benefit the aggregate sum of Thirty-one Thousand Three Hundred Forty-nine and 16/100 Dollars ($31,349.16) (R. 48). By supplemental complaint petitioner then sought recovery of this amount from respondents, jointly and severally (R. 31). It was stipulated that the liability of petitioner to its employee, Chester Hugunin, was clear and that a defense to his claim on the merits would have been unavailing. It was further stipulated that this settlement was a reasonable and prudent compromise made in good faith,

and that the settlement paid to Hugunin was just, fair and reasonable (R. 49).

At the conclusion of the trial, the court dismissed the action (R. 148) on the grounds that Section 6 of the contract was inapplicable to Hugunin's claim, and that, if it were, the contract was void as an attempt by a common carrier to avoid its liability (R. 138-147).

Since the case was tried without a jury, the court made the following findings of fact, pursuant to Rule 52 (a) of the Federal Rules of Civil Procedure, relating to petitioner's status as a common carrier of respondents' circus (R. 132-138):

> "13. Chicago and North Western Railway Company is a common carrier by rail of freight and passengers for hire, domiciled in the State of Wisconsin, and maintaining lines and services in the states of Michigan, Wisconsin and other states, conducting its operations in both interstate and intrastate commerce.
>
> * * * * *
>
> 20. At the time the contract declared upon was negotiated and executed by the parties, neither Chicago and North Western Railway nor its affiliate railroad offered any alternative contract for transportation of the circus rolling stock, personnel and property.
>
> * * * * *
>
> 21. Total consideration for transportation under the contract, exclusive of federal taxes, was the sum of $12,625.00. According to the only evidence given on the point, these transportation charges were made at levels resulting in a profit to the railroad, and plaintiff offered no evidence to the effect that in fact, these rates were reduced, or that same failed to result in a profit.

22. The evidence shows that the various railroads with which the defendant circus has dealt generally solicit the business of transporting the circus train. The contract was filed with the Public Service Commission of Wisconsin.

23. So far as was shown, both the Chicago and North Western Railway and its affiliate railroad hold themselves out to perform the service of transporting circus trains, using the railroad's engines, tracks, facilities and crews, and, in the State of Wisconsin alone, during the years 1949 and 1950, as evidenced by filed tariffs, transported some eleven circus outfits over its lines in that state.

* * * * *

32. It appears that tariffs covering the movement of the circus train, as well as tariffs covering movements of other shows, carnivals and circuses, were filed by plaintiff railroad with the Public Service Commission of the State of Wisconsin."

In an opinion written by Judge Rives, concurred in by Judge Holmes, the Court of Appeals for the Fifth Circuit upheld petitioner's contention that the validity of the subject contract was determined by federal law. While the opinion did not directly construe the contract, it did indicate that the provision that the railroad's employees should be deemed the respondent's employees while working on the circus train could make the indeminfication provisions of the contract applicable to payments on account of injuries suffered by the railroad's employee. The opinion then concluded that the contract was not an attempt to escape liability under the Federal Employers' Liability Act or the Safety Appliance Act, but held that the contract was void because petitioner was a common carrier with respect to respondents' circus. It reached this conclusion because it felt that the trial court had made a finding of fact that the railroad

was actually operating as a common carrier and also because the contract in question had been filed with the Interstate Commerce Commission pursuant to Rule 63 of Tariff Circular 20. Judge Strum dissented without opinion. Subsequently, rehearing was denied by a divided court.

Specification Of Errors Relied On.

The Court of Appeals erred:

1. In holding that petitioner was a common carrier of privately owned circus trains at the time of the execution and performance of the contract herein involved.

2. In holding that the indemnity provisions contained in said contract were void and against public policy.

3. In failing to hold that since petitioner was not acting as a common carrier, but merely as a special carrier, it could validly contract specially for this movement and for a warranty of fitness of the equipment of the respondents involved herein.

4. In failing to hold that the claim arising as a result of the injuries sustained by Hugunin was covered by section 6 of the special carrier agreement.

5. In failing to hold that by maintaining the grab-iron on car 83 in a defective condition, the respondents breached the covenant of warranty contained in Section 3 of the contract of July 20, 1950.

6. In affirming the judgment of the District Court for the Western District of Texas.

Reasons for Granting the Writ.

1. Prior to the decision in this case, the United States Courts of Appeals uniformly held that a railroad was not a common carrier of circus trains composed of cars owned by the circus and moving pursuant to a special contract which provided for an individualized schedule, *Sasinowski* v. *Boston & Maine R. R. Co.,* 74 F. (2d) 628 (C.A. 1st, 1935); *M'Cree* v. *Davis,* 280 Fed. 959 (C.A. 6th, 1922); *Clough* v. *Grand Trunk Western Ry. Co.,* 155 Fed. 81 (C.A. 6th, 1907); *Wilson* v. *Atlantic Coast Line R. Co.,* 129 Fed. 744 (N.D. Ga., 1904) *aff'd* 133 Fed. 1022 (C.A. 5th, 1904), *cert. den* 198 U.S. 585; and *Chicago, M. & St. P. R. Co.* v. *Wallace,* 66 Fed. 506 (C.A. 7th, 1895). Although the majority opinion in this case indicates that Judges Holmes and Rives were fully cognizant thereof, they attempted to distinguish these precedents on three grounds: (1) the trial court's finding of fact that petitioner was a carrier of circus property and soliciting such employment; (2) the decision in *Bernardi Greater Shows* v. *Boston & Maine R.R. Co.,* 86 N. H. 146, 165 Atl. 124 (1933) which simply passed on an issue raised by the pleadings in a preliminary stage of the case, and (3) Rule 63 of the Interstate Commerce Commission's Tariff Circular 20 (R. 171-184). None of the foregoing are valid reasons for a different result.

The trial court made no finding of fact that petitioner held itself out as a common carrier of circus trains. Findings 13, 20, 21, 22 and 23, and 32 contain everything which bears upon petitioner's status as a common carrier (R. 133-138).

It is true that finding No. 13 states that petitioner's general business is that of a common carrier. This is undisputed; it is, however, settled law that a common

carrier becomes a private carrier when it ventures beyond the scope of its public undertaking, *Santa Fe P. & P. R. Co.* v. *Grant Bros. Construction Co.*, 228 U.S. 177, and cases there cited. This is what petitioner contends occurred here.

Finding No. 20 is that petitioner offered no alternative contract to respondents for the transportation of circus rolling stock, personnel and property. That also is true. However, in *Sasinowski* v. *Boston & Maine R.R. Co.*, 74 F. (2d) 628 (C.A. 1st, 1935), the court considered the effect of a recital in the contract that the circus was given the option of having its property hauled by the railroad as a common carrier. The presence of that clause was construed as a possible indication that the railroad was in fact a common carrier of circuses, merely seeking to limit its liability pursuant to Section 20 of the Interstate Commerce Act (49 U. S. C. 20). The court held that the carrier in that case was not a common carrier of circuses because the option referred to in the contract was the choice of having the component parts of the circus shipped by regular freight and passenger service under the tariffs and conditions applicable to each part respectively, not a higher rate for the transportation of the train as a unit.

Clearly, the Court of Appeals in the *Sasinowski* case held that the presence of alternative rates for hauling of circus trains as a unit, differing in the scope of the liability of the carrier, indicated common carrier status. Finding 20 is that such alternatives were not available in this case. To draw an inference of common carrier status from this fact is in direct conflict with the *Sasinowski* case as to the significance of alternative rates.

Finding No. 21 was that the charges for the haulage resulted in a profit to the railroad and that there was no evidence of reduced rates. This finding has no relationship to common carrier status. The level of revenue is not significant, (See paragraphs 2 and 3, *infra*); the question involved is the scope of the railroad's public undertaking.

Findings 22, 23, and 32 state that various railroads solicited the transporting of respondents' train, and that petitioner held itself out to perform the service of hauling circus trains. What other railroads do is of no significance, whatever, as to the scope of petitioner's undertaking, and the finding that petitioner holds itself out to perform the service of hauling circus trains is of no significance since it does not show the manner of such holding out, i.e., whether by negotiation on an individual basis or a general undertaking to carry (See paragraph 2, *infra* for the significance of this distinction). These findings contain statements that petitioner filed this and other contracts with the Public Service Commission of Wisconsin and with the Interstate Commerce Commission. * * * These contracts are the only written evidence of petitioner's holding out; the only other testimony was that of respondent Davenport, who testified that he did not know whether or not the petitioner generally solicited circus business (R. 78). A finding of common carrier status upon the basis of filing the contracts with the Commission is in direct conflict

*** The District Court mistakenly characterizes these documents as tariffs. However, examination shows that none of them is a general tariff, but, on the contrary, each was a specific, individually executed, special contract (R. 108-120).

with *M'Cree* v. *Davis*, 280 Fed. 959 (C.A. 6th, 1922), where the circus haulage contract was executed pursuant to a general freight tariff, filed with the Interstate Commerce Commission by the carrier.

The significance given Rule 63, Tariff Circular 20, of the Interstate Commerce Commission is also in conflict with the holding in the *M'Cree* case, since the failure of the Commission to refuse permission to file indicates that the Commission believed it had jurisdicton. Moreover, Rule 63 was first promulgated as part of Tariff Circular 18 on March 18, 1907, and the *Clough*, *M'Cree* and *Sasinowski* cases were all decided since its issuance. Obviously, the tariff in the *M'Cree* case was promulgated pursuant to it. Also, the *Sasinowski* case arose out of the same accident as the *Bernardi Greater Shows* litigation, and, in the latter, the second opinion construed Rule 63 as authorizing these contracts. Therefore, this ruling of the Court of Appeals for the Fifth Circuit in the case at bar is in direct conflict with the aforementioned cases on this point as well.

Likewise the reliance of the Court of Appeals for the Fifth Circuit upon the first *Bernardi Greater Shows* v. *Boston & Maine R. R. Co.* opinion is in direct conflict with the *Sasinowski* case. In that case, the *Bernardi* opinion was the principal authority relied upon by the plaintiff to impose liability upon the railroad, and was specifically rejected by the Court of Appeals for the First Circuit

It has been shown that none of the reasons advanced by Judge Rives constitute a valid basis for distinguishing the holdings of the First, Sixth and Seventh Circuits that railroads are not common carriers of circuses. As a result it is apparent that there is a square conflict be-

tween the majority opinion in this case, and the unanimous holdings of the Court of Appeals for three other circuits as to the status of railroads hauling circuses under special contract. This conflict should be settled by this Court.

2. The evidence of petitioner's holding itself out as a carrier of circuses consisted of eleven individual circus contracts (R. 108-122). In deviating from the prior Federal decisions and holding that petitioner was a common carrier of circuses, the Court of Appeals for the Fifth Circuit ignored the qualitative rules as to the kind of holding out which establishes common carrier status as laid down in the applicable decisions of this Court.

In the early case of *Gracie v. Palmer*, 8 Wheat. 605, 633 (21 U. S.), this Court, in applying the law of common carriers to the construction of a ship charter, noted that there was a distinction between one who rented his vehicle to others for their use in the transportation of goods, and one who used his equipment himself for the transportation of others' goods. This Court further held that it made no difference whether the owner of the ship furnished the crew and equipment, but that the true test was whether the goods to be hauled were turned over to the possession and control of the carrier. In the instant case, the train was loaded by the circus, accompanied by its personnel and moved on a schedule drawn up by the circus to suit its own business needs. By the terms of the contract, the railroad furnished only an engine, caboose, train crew and the right of passage over its tracks (R. 8). (This was also true of the other contracts.) At no time did the possession of the circus property ever pass to the railroad. Hence, under the definition of the *Gracie* case, no common carrier liability could result.

In *Propeller Niagara* v. *Cordes*, 21 How. (62 U.S.) 7 (1858); *The Lady Pike*, 21 Wal. (88 U.S.) 1, 14 (1874), and *Santa Fe Railway* v. *Grant Bros.*, 228 U.S. 177 (1908) this Court defined a common carrier. With respect to the nature of the holding out, each opinion noted that there must be a holding out to the public, generally, as being willing to accept the goods of anyone, indiscriminately, for transportation.

In *Tap Line Cases*, 234 U. S. 1 (1913), this Court reviewed a decree of the Commerce Court, setting aside a decision of the Interstate Commerce Commission that the railroads involved were plant facilities and not common carriers entitled to divisions of rates. In that case, this Court stated that the principle applicable in determining common carrier status was the extent to which the public has a right to demand service of a railroad, not the extent to which it is actually used.

Under these principles, it is clear that petitioner was not a common carrier. The record herein does not show the filing of general tariffs, the publication of an offer to carry any circus which might apply for transportation, or any general holding out which a member of the public might accept. The facts shown in the record certainly would not obligate petitioner to haul any circus which might apply; hence, under the foregoing cases, petitioner would not be a common carrier of circuses.

Probably the most conclusive evidence of conflict with the applicable decisions of this Court is the fact that in *Baltimore & O. Ry. Co.* v. *Voight*, 176 U. S. 498, 513 (1899), this Court determined the validity of a special carrier contract between a railroad and an express company. In holding that a railroad could act as a special

carrier, the Court relied upon a number of authorities as stating the correct law. Among them were *Coup* v. *Wabash etc. R. Co.*, 56 Mich. 111, 22 N.W. 215; *Robertson* v. *Old Colony Railroad Company*, 156 Mass. 525, 31 N. E. 650, and *Wilson* v. *Atlantic Coast Line R. Co.*, 129 Fed. 774 (D. C. Ga., 1904) *aff'd* 133 Fed. 1022 (C.A. 5th, 1904) *cert. den.* 198 U. S. 585, all of which held that a railroad was not obligated to receive and transport circus trains as a common carrier.

3. The decision of the Court of Appeals for the Fifth Circuit is manifestly erroneous, in addition to being in conflict with the decisions in other courts and the applicable decisions of this Court, because it ignores both the normal scope of a railroad's common carrier undertaking and the factors necessary to broaden the scope of such undertaking.

In addition to the Federal cases heretofore cited, most authorities hold that a railroad is not a common carrier of circuses, *Robertson* v. *Old Colony Railroad Co.*, 156 Mass. 525, 31 N. E. 650; *Coup* v. *Wabash etc. Ry. Co.*, 56 Mich. 111, 22 N. W. 215; *Forespaugh* v. *Delaware etc. Ry. Co.*, 128 Pa. 217, 18 Atl. 503; *Chicago etc. R. Co.* v. *Hamler*, 215 Ill. 525, 74 N. E. 705; *Cleveland etc. R. Co.* v. *Henry*, 170 Ind. 94, 83 N. E. 710; *Sabol* v. *Chicago and N. W. Ry. Co.*, 225 Mich. 548, 238 N. W. 281, and *Sager* v. *Northern Pacific Ry. Co.*, 166 Fed. 526 (D. C. Minn., 1908), and *Bernardi Greater Shows* v. *Boston & M. R. R. Co.*, 89 N. H. 490, 1 A. (2d) 360.

All of these cases refer to the fact that the shipments involved in a circus train constitute a mixture of wild animals, which are not normally carried as part of a railroad's business, persons and property lumped to-

gether in one train moving on an irregular schedule determined by the shipper. They also regard it as significant that a contract and not a bill of lading is used, that the loading and unloading of the train is performed by personnel of the circus, that special spotting arrangements are required, that the personnel-carrying cars are used as permanent living quarters, and that the care of the property while in transit remains in the hands of the circus personnel.

The rationale of these cases is simple and sound. It is simply that where the type of haulage involved differs from the railroad's normal operations, common carrier liability should not be imposed in the absence of a specific general undertaking to perform that type of service.

The unique nature of circus haulage was recognized in *Coma* v. *St. Louis-San Francisco Ry. Co.*, 74 I. C. C. 400 (1922). There a circus owners' association had complained that the practices of the railway company in handling circus trains constituted an unjust discrimination as prohibited by the Interstate Commerce Act. The Commission held that, even if it had jurisdiction, there was no violation of the Act, since the handling of circus trains was so much different than the handling of ordinary railroad traffic. In view of this recognized difference and the extra precautions recognized by the Commission as necessary in the handling of such traffic, a greater degree of selectivity must of necessity be permitted the carrier in determining which circuses it will haul. This will not be possible if circus train haulage is held to be a common carrier activity.

Four decisions were cited by respondents in the Court of Appeals against the foregoing proposition with respect to circuses. In *Southern Pacific Company* v. *State of*

Arizona, 249 U. S. 472, this Court merely held that a state commission had the power to regulate the intra-state transportation of circus outfits. Nothing in the rationale of that decision required a determination that the railroad was a common carrier since the issue involved was the general scope of state police power as applied to the regulation of any business. This was also true of *A. T. & S. F. R. Co.* v. *State* (Okla.) 206 Pac. 252. In *Maucher* v. *Chicago, I. & P. R. Co.*, 100 Neb. 237, 159 N. W. 422, the court actually held that the release contained in the plaintiff's contract of employment with the circus would be invalid because wanton or gross negligence on the part of the carrier was involved. As the concurring opinion specifically pointed out, the language of the court with respect with the common carrier status of the railroad was purely gratuitious dicta.

The fourth case, *Bernardi Greater Shows, Inc.* v. *Boston & Maine R. R. Co.*, 86 N. H. 146, 165 Atl. 124, was the case principally relied upon in this case by the Court of Appeals for the Fifth Circuit. In addition to the fact that it was specifically disapproved in *Sasinowski* v. *Boston & Maine R. R. Co.*, 74 F. (2d) 628 (C.A. 1st, 1935), it was reversed in a later decision of the same court, 89 N. H. 490, 1 Atl. (2d) 360. The first *Bernardi* opinion resulted from a submission to the New Hampshire Supreme Court of a certified question prior to the trial of the case. The New Hampshire court recognized the Federal authorities, but held that the option given in the contract of shipping the show at higher rates under a tariff, thereby securing common carrier liability from the railroad, was sufficient to indicate a holding out as a common carrier of circuses. This, not the facts relied upon in this case by the Court of Appeals for the Fifth Circuit, was the situation to which

the language quoted by the Court of Appeals was applicable. The Court quite properly viewed this alternative as an attempt to limit liability under Section 20 of the Interstate Commerce Act. In the second *Bernardi* case opinion, the Court carefully pointed out that the first *Bernardi* case was decided only upon the complaint and contract. In reversing its former holding, it relied primarily on the fact that the tariffs, classifications, and rules were subsequently shown to be those applicable to the various items of property moving on regularly scheduled freight trains and to passengers moving on passenger trains. Therefore, the holding in the first *Bernardi* case is not authority for the position taken below by the Court of Appeals for the Fifth Circuit, since the first *Bernardi* case assumes a filed general tariff, and the second *Bernardi* case held filing of the contract was not sufficient.

The basic question for determination is the nature of the holding out by the railroad company. In addition to the decisions of this Court, heretofore cited (par. 2, *supra*), it is well-recognized that the holding out must be a manifestation of willingness to carry property for all persons indifferently. In other words, it must be a general statement by the railroad that it will haul upon stated terms and conditions any circus that is tendered to it. See *Larson* v. *Aetna Life Ins. Co.*, 19 Wash. (2d) 601, 143 P. (2d) 850; *Campbell River Mills Co.* v. *Chicago, M. & St. P. R. Co.*, 42 F. (2d) 775 (W. D. Wash. 1930); *People* v. *Duntley*, 217 Cal. 150, 17 P. (2d) 715; *Rutledge Co-op. Ass'n* v. *Baughman*, 138 Atl. 29, 153 Md. 297; *Jackson Architectural Iron Works* v. *Huntbut*, 158 N. Y. 34, 52 N. E. 665; *Hissem* v. *Guran*, 112 Ohio St. 59, 146 N. E. 808; *State ex rel Board*

of Railroad Com'rs v. *Rosenstein,* 217 Iowa 985, 252 N.W. 251 and *Jacksonville Bus Line Co.* v. *Watson,* 349 Ill. App. 462 (mem., 1935). This is also the rule announced in the two *Bernardi* opinions. The difference between the *Bernardi* cases was that, in the first case, the court was under the impression that the Boston & Maine R. R. Co. published general tariffs for the movement of circus trains as a unit. While the failure to publish such general tariffs is not proof of a lack of common carrier status, it is an indication thereof, (*United States* v. *Interstate Commerce Commission,* 288 Fed. 649, 654 (C. A. D. C., 1923).

The record before this Court is devoid of any proof that petitioner filed any general tariffs, rules, regulations or conditions governing the carriage of circus trains, either with the Interstate Commerce Commission or any regulatory body. The record is devoid of proof that the petitioner ever held itself out to the public generally as being willing to haul the circus trains of any show which applied to it for transportation. On the contrary, the record clearly indicates that each circus transaction was handled by petitioner separately (R. 72-73, 109-122). The finding of fact that petitioner solicited such business and held itself out as being willing to haul circus trains is of no significance since the evidence on which it was based was uncontroverted, *Fritz v. Jarecki,* 189 F. (2d) 445, 448 (C.A. 7th, 1951); *Orvis* v. *Higgins,* 180 F. (2d) 537, 539 (C.A. 2nd, 1950); and *Campbell Soup Co.* v. *Wentz,* 172 F. (2d) 80, 82 (C.A. 3rd, 1949). Moreover, it failed to recognize that the nature of the holding out was simply that the petitioner was willing to negotiate, individually, for the carriage of each train.

The Court of Appeals for the Fifth Circuit primarily relies upon Rule 63 of the Interstate Commerce Com-

mission Tariff Circular No. 20 (R. 182-4), and the decisions of the Interstate Commerce Commission in *Chappelle* v. *Louisville & N. R. R. Co.*, 19 I.C.C. 56, 56, 19 I.C.C. 456, and *Coma* v. *St. L. S. F. R. Co.*, 74 I.C.C. 400. For a number of reasons, this rule and compliance with it are not indicative of common carrier status.

In the first place this identical rule was urged as having the effect of indicating that the railroad involved was a common carrier in *Bernardi Greater Shows* v. *Boston & M. R. R. Co.*, 89 N. H. 490, 1 A. (2d) 360. In that case the Court noted that the evidence was unquestioned that the defendant had filed its special contracts with the Commission for many years pursuant to that rule, but construed the rule as recognizing such special contracts. Moreover, in *M'Cree* v. *Davis*, 280 Fed. 959 (C.A. 6th, 1922), the contracts were executed pursuant to a freight tariff filed with the Commission.

In the *Coma case* (74 I.C.C. 400), the railroad moved to dismiss for lack of jurisdiction on the grounds that it was acting as a private carrier of circus trains. The Commission expressly declined to decide that question, holding that the acts complained of with respect to circuses were not in violation of the Act even if the Commission had jurisdiction over circus haulage. Subsequent to the Commission cases cited by the Court of Appeals, the Commission clearly indicated its opinion that the haulage of circus trains was not a common carrier activity on the part of the railroads. The case of *Petroleum Rail Shippers Assn.* v. *Alton & S. R.*, 243 I.C.C. 589, 620 (1941) involved the rates charged for bulk shipments of petroleum. The complaining shippers' association offered an exhibit setting forth the charges for the transportation of circus trains on the theory that they were comparable

rates. The presiding Commissioner sustained an objection to the admissibility of such evidence on the ground that it was not comparable since the railroad transported circus trains as a private carrier and not as common carrier. On a petition to reconsider, this ruling was affirmed by the whole Commission.

Another indication that the Commission does not believe that the haulage of circus trains is a common carrier activity is contained in a comparison of the present and former versions of Rule 63. When Rule 63 was first issued in 1907 as a part of Tariff Circular 18, it contained a preliminary statement that the Interstate Commerce Act applies to the transportation of circuses. This statement was omitted from the later version of this same rule, reflecting the later views of the Commissioner when actually confronted with this issue quasi-judicially.

The Court of Appeals in the instant case was influenced by the similarity between the language of the Interstate Commerce Commission rule applicable to the haulage of circus trains by railroads to that of the rule applicable to such haulage by motor carriers. (See Appendix A, *infra*, for the texts of these rules.) The only difference is that the recital of the applicability of the Interstate Commerce Act contained in the motor carriers' rule is omitted from the railroad carriers' rule. From this, the court draws the inference that, since the Act is specifically declared applicable to motor carriers and the rest of the language is the same, the Commission must have concluded that it was applicable to railroads. What the Court of Appeals failed to consider, however, was that the language concerning the applicability of the Act was present in the earlier version of the railroad rule (Rule 63, Tariff Cir-

cular 18), and was subsequently stricken (Rule 63, Tariff Circular 20). The court also failed to consider the fact that the scope of the Act is different with respect to railroad carriers and motor carriers. The railroad rule, omitting the recital of applicability of the act, was promulgated under Part I of the Act which is applicable to common carriers by railroad, 49 U.S.C. § 1. The motor carrier rule, containing the recital of applicability, was promulgated under part II of the Interstate Commerce Act which is applicable to both common carriers and contract carriers by motor vehicle 49 U.S.C. § 204. It is clear that if this contract were one for carriage by motor vehicle, the carrier would be a contract carrier as defined in Section 203(15) of that Act, not a common carrier. Viewed comparatively and in the light of its history, it is clear that the text of Rule 63 and the decisions involving it indicate that railroads are not common carriers of circuses.

The Court of Appeals found it unnecessary to decide the question as to whether Hugunin's injuries were within the scope of the contract. It indicated, however, that it believed that they were (R. 176). Such a conclusion is amply supported by the record. It is well known that a contract must be read as a whole (3 *Williston, Contracts* (Rev. Ed.) § 618; 2 *Restatement, Contracts* § 235). With respect to this rule, the *Restatement of Contracts* provides that a sentence or paragraph of dubious meaning taken by itself may be made clear by other parts of the writing, and even words having a clear meaning themselves may be given a different meaning because of their context (*Restatement, Contracts,* § 235 *Comment on Clause* (*C*), p. 322). Applying this rule to Section 6 of the contract, it is clear that had an employee of the circus been

injured in this manner and brought claim against the railroad the provisions of Section 6 would have been applicable. The effect of the provision that the railroad's employees, including Hugunin, shall be deemed employees of the circus while working on the train is to place Hugunin in the same position.

Moreover, independently of Section 6, petitioner was entitled to recover under the contract for its payments to Hugunin. By section 3 of the contract, respondents warranted that all the equipment, including car No. 83, would be provided with all devices required by law and kept in the condition required by law during the period of the contract. A firmly affixed grabiron is required by the Safety Appliance Act (45 U.S.C. § 4). In *Sartoris* v. *Utah Construction Co.*, 21 F. (2d) 1 (C.A. 9th, 1927) and *City of Lake View* v. *MacRitchie*, 134 Ill. 203 (1890) similar language to Section 3 was construed as constituting a warranty. Damages for injuries to a third person resulting from a breach of warranty are recoverable. *London Guarantee & Accident Co.* v. *Strait Scale Co.*, 322 Mo. 502, 15 S.W. (2d) 766; *Boston Woven Hose Co.* v. *Kendall*, 178 Mass. 232, 59 N.E. 657 and *Mowbray* v. *Merryweather*, 2 Q. B. 640 (1895).

4. The status of railroads with respect to circus train haulage is a question of general importance on which the law should be definitely settled by this Court. The necessity of the continued availability of the present form of railroad transportation for circus trains is clearly indicated by the testimony of respondent Davenport that circuses will agree to anything to persuade railroads to haul them (R. 78). The Interstate Commerce Commission distinctly recognized that low transportation costs are necessary to various traveling theatrical companies because, if

forced to move at regular tariff rates, continued operation would be impossible for many of them, *In the matter of Party Rate Tickets,* 12 I.C.C. 96, 101 (1907). At the same time the special hazards in the transportation of circus coaches, which are often old, more likely to develop defects, and routed in such a way that less rigorous inspection can be given them during the show season, were recognized in *Coma* v. *St. Louis-San Francisco Railway Co.*, 74 I.C.C. 400 (1922). Under these circumstances the chances of injury from latent defects are high. A rule which prevents a railroad from passing on such risks to the circus, for whose benefit the contract is made, would result in either burdening the entire circus industry with a high rate of carriage, because of an amortizing factor for such risks, or, since a railroad may not be compelled to carry a circus, the refusal of railroads to haul special trains composed of cars owned by circuses. It is a matter of common knowledge that circuses depend upon this type of transportation, and such a refusal by railroads would result in a major disruption in the circus industry.

This decision is of unusual importance since it comes from the Fifth Circuit, embracing most of the southern states. It is a matter of common knowledge that during the summer most circuses are extremely transient, going into winter quarters in the South at the close of their season. Under these circumstances, it would be difficult, if not impossible, to bring suit against a circus on one of these contracts in any place other than a state lying within the Fifth Circuit. (See the opinions of the District Court for the Southern District of Iowa in this case, 94 F. Supp. 83 and 95 F. Supp. 469.) To permit this clearly erroneous decision by the Court of Appeals to stand under these circumstances would be most unjust.

As a matter of fact the decision of the Court of Appeals in this case has received wide publicity throughout the railroad industry (*Traffic World*, Vol. 92, No. 15, p. 60), and petitioner has received inquiries as to whether the question would be pursued in this forum. At least one of these inquiries stated that if it was not, the inquiring railroad would be forced to reconsider the desirability of handling circus trains in the present manner.

Moreover, the need for uniformity of rule in all matters where interstate commerce is concerned is so well recognized that this Court has held that Federal common law is to be applied, rather than state law under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, (*Western Union Telegraph Co.* v. *Call Publishing Co.*, 181 U. S. 92; *Dice* v. *Akron, Canton & Youngstown R. Co.*, 342 U. S. 359; *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239). This need for uniformity of law is present here. In the face of the clear conflict created by the decision in this case, the desired uniformity can only be obtained by a decision of this Court.

Conclusion.

The question presented in this case is one upon which the decisions of the other Courts of Appeals are unanimous and in conflict with the majority opinion in this case. The determination of the Court of Appeals for the Fifth Circuit that petitioner held itself out as a common carrier ignored the rules laid down in the decisions of this Court and was manifestly erroneous. As a result of this decision, a revision of railroad policy with respect to the transportation of circus trains is highly probable, working to the detriment of both industries. Moreover,

the need for uniformity of the law in this field is well recognized. In view of the conclusion reached by the Court of Appeals in this case, such uniformity can be provided only through a decision of this Court on the question presented by this petition. For these reasons petitioner respectfully submits that a writ of certiorari should issue to review the decision of the United States Court of Appeals in this case.

Respectfully submitted,

DRENNAN J. SLATER,
400 West Madison Street,
Chicago 6, Illinois.

AMOS M. MATHEWS,
The Association of Western Railways,
280 Union Station Bldg.,
Chicago 6, Illinois.

J. SAM WINTERS,

ARTHUR P. BAGBY,
P. O. Box 796,
Austin, Texas.
Attorneys for Petitioner.

GERALD M. CHAPMAN,
Of Counsel.

APPENDIX A.

Applicable Rules of the Interstate Commerce Commision.

Interstate Commerce Commission Tariff Circular No. 18 Issued March 18, 1907.

"63. Transportation of Circus Outfits (Issued March 18, 1907).—The act to regulate commerce, as amended June 29, 1906, applies to the transportation of circuses and other show outfits, but the Commission recognizes the peculiar nature of this traffic and the difficulty of establishing rates thereon in advance of shipper's requests describing the character and volume of the traffic offered, and has therefore entered a general order authorizing carriers to establish rates on circuses and other show outfits by tariff, to become effective one day after filing thereof with the Commission, and relieving them from the duty of posting such tariffs in their stations. Such tariff may consist of a proper title page reading 'As per copy of contract attached' and to it may be attached a copy of the contract under which the circus is moved. As far as practicable, general rules or regulations governing the fixing of such rates should be regularly published and filed."

Code of Federal Regulations (1949), Title 49—Transportation, Chapter 1—I.C.C.

As applicable to freight service (railroads):

"Sec. 141.63. *Transportation of Circus Outfits.*

"Rates for specified movements of circuses and other show outfits may be established on not less than 1 day's notice to the commission. Such tariffs must bear reference to this rule and must publish the charges specifically, showing the number and kind of cars moved, or may consist of a proper title page reading 'as per copy of con-

tract attached, and to it may be attached a copy of the contract under which the circus moved. Tariffs containing such rates need not be posted at stations. As far as practicable, general rules or regulations governing the fixing of such rates should be regularly published, posted and filed upon statutory notice."

As applicable to motor carrier service (trucks), the same regulation is made, the first sentence, however, reading as follows:

"Sec. 145.63. *Transportation of circus outfits.*

"The Interstate Commerce Act applies to the transportation of circuses and other show outfits, but the Commission recognizes the peculiar nature of this traffic and the difficulty of establishing rates thereon in advance of shippers' request describing the character and volume of the traffic ordered, * * *."

APPENDIX B.

Excerpts From Contract of July 20, 1953 Between Chicago and North Western Railway Company and Dailey Brothers Circus.

"1. That it is mutually understood and agreed that the Railroad is not a common carrier of circuses or show outfits, or cars and equipment carrying the same, and has never held itself out as such; and that it enters into this agreement as a Special carrier only, and not as a common carrier.

* * *

3. All equipment presented by party of the second part for transportation hereunder shall be in proper, good and sufficient condition and shall be provided with all devices required by law and party of the second part shall keep the same in such condition during the continuance of this contract, and it shall contain no powder, fireworks, or explosives, or any animals to be transported in violation of any Federal, State or Muncipal laws, rules, regulations or requirements. Party of the first part shall have the right to inspect at any time all or any of such equipment or contents and exclude the same from the benefit of this contract; but this provision shall not be held to cast upon the party of the first part the duty to so inspect nor any liability for failure to do so or to report defects.

* * *

6. The liability of the respective parties hereto as to all persons and property transported or to be transported in pursuance of this agreement, or coming upon the premises of the railroad company in connection therewith or otherwise in connection with the business of party of the second part, shall be governed by the provisions hereof, and in that behalf it is agreed that this contract is not made with the said railway company as a carrier, either common or special, of the said persons or property of any thereof (the compensation to be paid by said party

of the second part being wholly inadequate consideration for any such undertaking), but as a hirer to the party of the second part of the motive power and equipment and of men to operate the same, and of the right to use the road and tracks of the said railway company, to the extent necessary in the premises, and that the conductors, engineers, trainmen, and other officials, agents or employees furnished by the said railroad company hereunder shall, for all purposes of this contract, while engaged in such employment, be deemed to be the servants of the party of the second part, and to be operating said motive power and equipment under the orders, direction and control of the party of the second part; and party of the second part hereby fully releases and discharges the said railway company from, and agrees that the said railway company shall not be liable to the said party of the second prt, nor to any person or persons, for any injury or damage which may happen to any persons, cars or property to be or which may be transported hereunder, or otherwise may be upon said train or upon the railway company's premises, which may be caused by any defect in the railroad tracks or premises of the party of the first part of unsuitableness thereof for such transportation, or by the negligence of said conductors, engineers, trainmen, or other officials, agents or employees of the railway company, or any or either of them, or arising from any cause whatsoever. Party of the second part hereby further covenants and agrees to protect, indemnify and forever hold free and harmless the said party of the first part from any and all liability, loss, judgments, costs and expenses whatsoever, arising from or in connection with claims or suits for damages on account of any such injury or damage."

FILED
DEC 28 1953
HAROLD B. WILLEY, Cle

NO. 460

IN THE

Supreme Court of the United States

October Term, A. D. 1953

CHICAGO AND NORTHWESTERN RAILWAY COMPANY,
A CORPORATION,
Petitioner

v.

BEN C. DAVENPORT, HARRY A. HAMMILL
AND DAILEY
BROS. CIRCUS, A PARTNERSHIP
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF FOR RESPONDENT, HARRY A. HAMMILL IN OPPOSITION

JOHN J. McKAY
703 Perry-Brooks Bldg.
Austin, Texas
Attorney for Respondent,
Harry A. Hammill

FIRM FOUNDATION PRESS

SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Rules Involved	2
Statement	3
Summary of Argument	9
Law Applicable	9
Construction of the Contract	12
Invalidity of the Contract	13
Argument	17
Law Applicable	17-21
Construction of the Contract	21-31
Invalidity of the Contract	31-50
Conclusion	50
Appendix	51 et seq.

INDEX OF AUTHORITIES

	Page
Adams Exp. Co. v. Croninger, 226 U.S. 491, 57 L. ed. 314	15, 17
Alabama v. Montague, 117 U.S. 602, 29 L. ed. 1000	12, 26
9 Am. Jur., § 4, p. 430	14
9 Am. Jur., § 13, p. 437	14
9 Am. Jur., § 769, p. 897	13, 27
9 Am. Jur., § 771, p. 898	14, 38
10 Am. Jur., § 1623, p. 366	15, 48
11 Am. Jur., Conflict of Laws, § 19, p. 407	21
12 Am. Jur., §§ 237, 238, pp. 762, et seq.	12, 23
12 Am. Jur., § 244, p. 779	26
12 Am. Jur., § 251, p. 793	12, 26
20 Am. Jur., § 187, p. 192	15, 48
27 Am. Jur., § 9, p. 460	16, 44
27 Am. Jur., § 11, p. 461	16
54 Am. Jur., § 356, p. 980	11

INDEX OF AUTHORITIES—(Cont'd.)

	Page
57 A.L.R. 175	12
68 A.L.R. 1418, 1421	48
72 A.L.R. 250	12, 21
175 A.L.R. 12, 16. (American Law Institute Rules)	42, 44
21 A.L.R. 2d 247	11
A. T. & S. F. R. Co. v. State, (Okla. Sup. Ct.) 206 Pac. 252	14, 34
Barron & Holtzoff, Fed. Prac. & Pro., § 25, p. 52	10
Barron & Holtzoff, Fed. Prac. & Pro., §§1132, 1133	31
Bernardi Greater Shows, Inc. v. Boston & Maine R. Co., (N.H. Sup. Ct.), 165 A. 124, 1 A. 2d 360, 14 A. 2d 1	12, 14, 15, 24, 36, 48
Brady v. Terminal R. Asso., 303 U.S. 10, 82 L. ed. 614	46, 47
California v. Zook, 336 U.S. 725, 93 L. ed. 1005	11, 18

Page

Chappelle v. L. & N. R. Co., (I.C.C.)
19 I.C.C. 56, 456 ..... 14, 32

C. M. & St. P. R. Co. v. Wallace, 66 F. 506
..... 14, 24, 37

Chicago & N. W. R. Co. v. Chicago Packeged Fuel Co., (C.C.A. Ill.) 195 F. 2d 467, cert. den., 73 S. Ct. 39 13

C. & O. R. Co. v. Martin,
283 U.S. 209, 75 L. ed. 983 17

Chicago, R. I. & P. R. Co. v. Maucher,
248 U.S. 359, 63 L. Ed. 294 15

City of New Albany v. Burke,
78 U.S. 96, 20 L. ed. 155 31

Clough v. Grand Trunk W. R. Co., 155 F. 81 24

Cockburn v. O'Meara, (C.C.A. Tex.),
141 F. 2d 779 ..... 11, 21

Coma v. St. L. S. F. R. Co., et al. (I.C.C.)
74 I.C.C. 400 ..... 14, 33

13 C.J.S., § 96, p. 185 42

Page

42 C.J.S., § 7, p. 572 ..... 15, 46

74 C.J.S., § 425a., p. 1000 ..... 15, 46

Crane v. Ry. Exp. Agency, Inc., (Ill. Sup. Ct.) 15 N.E. 2d 866 ..... 14, 41

Dice v. Akron, C. & Y. R. Co., 342 U.S. 359, 96 L. ed. 398 (anno.) 50

Erie R. Co. v. Tompkins, 304 U.S. 64, 82. L. ed 1188, 114 A.L.R. 1500 ..... 10, 18, 19, 50

Elliott on Railroads (3rd ed.) § 443, p. 680 ..... 16, 43

Elliott on Railroads (3rd ed.) § 1997, p. 315 ..... 15, 46

Fairport, P. & E. R. Co. v. Meredith, 292 U.S. 589, 78 L. ed. 1446 11

Fordyce v. McFlynn, (Sup. Ct. Ark.) 19 S.W. 961 39

Forepaugh v. Delaware, etc. R. Co., 128 Pa. 217, 18 A. 503 24

Ft. W. & D. C. R. Co. v. Hunt, (Tex. Civ. App.) 258 S.W. 593 ..... 17, 43

INDEX OF AUTHORITIES—(Cont'd.)

Page

Ft. W. & D. C. R. Co. v. Rogers, (Tex. Civ. App.) 53 S.W. 366 49

Garrett v. Moore-McCormack, 317 U.S. 239, 87 L. ed. 239 50

Griffin v. McCoach, 313 U.S. 498, 85 L. ed. 1481, 134 A.L.R. 1468 11

Gully v. First Nat. Bank, 299 U.S. 109, 81 L. ed. 70 10

Halliburton Oil Well Cementing Co. v. Paulk, (C.C.A. Tex.) 180 F. 2d 79, Cert. den., 340 U.S. 812 ..... 13, 26, 27

I. & G. N. R. Co. v. Vandeventer, (Tex. Civ. App.) 107 S.W. 560 ..... 17, 20

Kelly v. Washington, 302 U.S. 1, 82 L. ed. 3 19

Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 85 L. ed. 1477 11

Kolkey v. Grossinger, 5th Cir., 195 F. 2d 525 31

Page

L. S. & M. S. R. Co. v. Perkins, 25 Mich. 329, 12 Am. St. R. 275 39

Lever Bros. Co. v. O. R. Co., (C.C.A. Md.) 164 F. 2d 738 30

Lewis Sutherland, Statutory Constr., Vol. 2, § 422 ..... 13, 27

Mass. Bonding & Ins. Co. v. Gottliev, (Tex. Com. App.) 15 S.W. 2d 1020 ..... 16, 46

Matter of Reisenberg, 208 U.S. 90, 52 L. ed. 403 10

Maucher v. Chicago, R. I. & P. R. Co., (Neb. Sup. Ct.) 159 N.W. 422 (Appeal dism., 248 U.S. 359, 63 L. ed. 294) 12, 14, 24, 35, 49

Mayhew v. McFarland, (Tex. Sup. Ct.) 153 S.W. 2d 428 ..... 14, 32

McCree v. Davis, etc., 280 F. 959 ..... 12, 23, 24, 40

24 Michigan Law Review, 186 ..... 14, 39

30 Michigan Law Review, 979 40

Page

Miller v. Long Bell Lbr. Co., (Tex. Sup. Ct.)
222 S.W. 2d 244 16

Minneapolis-Moline Co. v. C. M. St. P. R.
Co., (C.C.A. 8th) 199 F. 2d 725 40

M. K. T. R. Co. v. Carter, (Tex. Sup. Ct.)
68 S.W. 159 40

M. K. T. R. Co. v. Sealy, (U.S.)
63 L. ed. 296 10

Missouri Pac. Ry. Co. v. Fagan,
(Tex. Sup. Ct.) 9 S.W. 749 ..... 17, 43

Missouri Pac. Ry. Co. v. Ivey,
(Sup. Ct. Tex.) 9 S.W. 346 ..... 14, 38

Mostyn v. D., L. & W. R. Co., (C.C.A. 2d)
160 F. 2d 15 ..... 13, 29

Myers v. Reading Co., 331 U.S. 477,
91 L. ed. 1615 ..... 15, 46

N. Y. C. R. Co. v. Lockwood, 17 Wall. (U.S.)
357, 21 L. ed. 627 ..... 14, 38

N. Y. N. H. & H. R. Co. v. Nothnagle,
97 L. ed. 882 ..... 43, 44

INDEX OF AUTHORITIES—(Cont'd.)

	Page
Pennsylvania R. Co., et al. v. P. U. Comm. of Ohio, 298 U.S. 170, 80 L. ed. 1130	31
Philippine Air Lines v. Tex. Eng. & Mfg. Co., (C.C.A. Tex.) 181 F. 2d 923	16, 42
Renfro Drug Co. v. Lewis, (Tex. Sup. Ct.) 235 S.W. 2d, 609	13, 23
Robertson v. Old Colony R. Co., 156 Mass. 525, 31 N.E. 650	24
Rowe v. C. & S. R. Co., (Tex. Civ. App.) 205 S.W. 731, writ ref.	15, 47
Rue v. M. P. R. Co., (Tex. Sup. Ct.) 8 S.W. 533	11, 20
Sabol v. C. & N. W. R., 255 Mich. 548, 238 N.W. 281	24, 39
Sager v. N. P. R. Co., 166 F. 526	24
St. L. & S. W. R. Co. v. Arnold, (Tex. Civ. App.) 74 S.W. 819, 175 A.L.R. 146	13
St. L. & S. W. R. Co. of Tex. v. McIntyre, (Tex. Civ. App.) 82 S.W. 346	17

Page

St. L. & S. W. R. Co. of Tex. v. U.S., (C.C.A. Tex.) 29 F. 2d 568 ..... 15, 45

Santa Fe & P. R. Co. v. Grant Bros. Const. Co., 228 U.S. 177, 57 L. ed. 787 ..... 14, 40

Sasinowski v. Boston & Maine R. Co., 74 F. 2d 628 ..... 12, 19, 23, 24, 49

Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 94 L. ed. 1194, 1200 ..... 10, 18

Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 87 L. ed. 165 17

So. Kan. R. Co. of Tex. v. Sage, (Tex. Sup. Ct.) 84 S.W. 814 ..... 15, 47

So. Pac. Co. v. Arizona, 249 U.S. 472, 63 L. ed. 713, affirming 19 Ariz. 20, 165 Pac. 303 ..... 13, 15, 34

State, ex rel., etc. v. Kuykendall, 275 U.S. 207, 72 L. ed. 241 ..... 13, 32

Stumberg, Conflict of Laws (2d ed.) p. 266 16

8 Tex. Jur. § 15, p. 49; § 16, p. 50; §64, p. 118 ..... 17, 43, 49

Page

8 Tex. Jur., § 210, p. 315 13

9 Tex. Jur., § 4, p. 356 ..... 11, 20

9 Tex. Jur., § 10, p. 362 21

9 Tex. Jur., § 119, p. 407 11

10 Tex. Jur., § 110, p. 191 20

T. & P. R. Co. v. Archibald, 170 U.S. 665, 42 L. ed. 1188 ..... 15, 46, 48

T. & P. R. Co. v. Reiss, 183 U.S. 621, 46 L. ed. 358 ..... 12, 23

Union Pac. R. Co. v. Burke, 255 U.S. 317, 65 L. ed. 656 ..... 16, 42

Union Stock Yards Co. of Omaha v. C. B. & Q. R. Co., 196 U.S. 217, 49 L. ed. 453 ..... 16, 42

U.S. v. California, 297 U.S. 175, 80 L. ed. 567 ..... 13, 32

U.S. v. Nat'l. Assoc., R. E. B., 339 U.S. 485, 94 L. ed. 1007 ..... 14, 31

U.S. v. Wallace, (C.C.A. 9th) 18 F. 2d 20 13

Page

Western U. Teleg. Co. v. Call Publishing Co., 181 U.S. 92, 45 L. ed. 765 50

Westinghouse Elec. Elev. Co. v. La Salle Monroe Bldg. Corp., (Ill. Sup. Ct.) 70 N.E. 2d 604 ..... 13, 29

Wichita Royalty Co. v. Bank, 306 U.S. 103, 83 L. ed. 515 11

Williams v. Green Bay & W. R. Co., 326 U.S. 549, 90 L. ed. 311 ..... 11, 21

4 Williston on Contracts (Rev. Ed.) § 1089 A, pp. 3046, 3051 39

6 Williston on Contracts (Rev. Ed.) § 1751, p. 4960 ..... 16, 46

Words & Phrases, (Perm. Ed.), Vol. 3, p. 621, 643 ..... 12, 13, 27

STATUTES

Carmack Amendment, (49 U.S.C.A., § 20(11) 10, 15, 17

Code of Fed. Regs., Title 49, Transp. Ch. 1, § 141.63; § 145.63 ..... 13, 17, 32

STATUTES—(Cont'd.)

	Page
Complied Laws of Michigan, Vol. 3, §§ 462.3, et seq.; § 467.151	16
Federal Employers Liability Act (45 U.S.C.A., § 55)	12, 26
Federal Safety Appliance Act (45 U.S.C.A., § 4, et seq.)	11, 13, 15, 18, 45
Illinois Constitution, Art. XI, § 12	16, 48
Illinois Rev. Stat., (1949) Ch. 27 § 1	16
Illinois Rev. Stat. (1949) Ch. 111 2/3 § 10	16
Interstate Commerce Act (49 U.S.C.A., § 1, et seq.)	10, 13, 15, 17, 43
Texas Constitution, Art. X, § 2	16, 48
Texas Rev. Civ. Stat. (1925), Arts. 882, 883, 6360	16, 48
28 U.S.C.A. § 1652	10, 19
Wisconsin Statutes (1947) § 192.42; §192.43; 195.15, et seq.	16, 48

NO. 460

IN THE

Supreme Court of the United States

October Term, A. D. 1953

CHICAGO AND NORTHWESTERN RAILWAY COMPANY,
A CORPORATION,
Petitioner

v.

BEN C. DAVENPORT, HARRY A. HAMMILL
AND DAILEY
BROS. CIRCUS, A PARTNERSHIP
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF FOR RESPONDENT, HARRY A. HAMMILL IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 205 F. 2d 589.

JURISDICTION

The jurisdictional requisites are stated in the petition.

QUESTIONS PRESENTED

Petitioner states a somewhat nebulous question. Actually, the questions are these:

1. "Should the transportation contract between the parties be construed to give the railroad indemnity for damages paid its employees?"

2. "If the contract is subject to such a construction as to provide indemnity to the railroad, is the contract valid in light of the record, the Findings of the Courts below, and the law applicable?

3. "By what law are the ultimate questions of liability to be judged?"

STATUTES AND RULES INVOLVED

The statutes and rules involved are those set forth in the Appendix (post), and 49 U.S.C.A. § 1, Duty to Transport; § 3, Avoidance of Preferences; § § 8, 9, Liability to Those Damaged; § 10, Discrimination and Violation of Commission Regulations; § 20(11), Limitation of Liability.

STATEMENT

Petitioner, a Wisconsin corporation, brought this suit in Iowa against Texas citizens, invoking, for jurisdictional purposes, diversity of citizenship. (R. 2) No "federal question" was raised.

The judgment was not one dismissing the action, as stated by petitioner its brief, p. 7), but was to the effect that petitioner take nothing (R. 148).

The transportation contract appears in the record, pp. 8 et seq. Petitioner sounded its action as one in the nature of a claim for indemnity (R. 2, 6), and did not ask damages for a breach of warranty, as now urged in petitioner's brief, p. 24.

The trial court's extensive Findings of Fact appear in the record, pp. 130-138. At no time did petitioner except to any of such Findings. Respondent Hammill invites the Court's attention to a number of Findings not discussed in petitioner's brief. For brevity, pertinent Findings are summarized, in narrative form, with references to their respective numbers and to the record:

Dailey Bros. Circus operated a railroad circus business, leasing railroad rolling stock from the Lone Star Corporation; the circus was not a railroad, nor a common or specialized carrier for hire, made no charge to its employees or other persons riding upon or in the railroad cars, and the train

was transported by rail, movement being pursuant to arrangements with various railroad companies (No. 14, R. 133). In the spring of 1950, as was customary, the Texas and New Orleans Railroad, serving the circus winter quarters of Gonzales, Texas, made extensive inspections and repairs of the circus rolling stock, all at the expense of the circus, and thereafter, this railroad accepted the rolling stock, moving it by use of its own engines and crews, over its lines (No. 16, R. 134). As the circus continued its season's itinerary, its rolling stock was inspected by the various receiving railroads, and repairs made by them when necessary (all at the cost of the circus), which inspections and repairs were done exclusively by that railroad over whose lines the circus was moving. (No. 17, R. 134).

The very nature of the circus business was such that it was necessary that it contract several weeks in advance for movement over a line where, to the greatest extent possible "double hauls" would be avoided (i.e., same-day movement over two different lines, requiring double payments) (No. 18, R. 134). Petitioner and its affiliate are, in some instances, the only lines serving certain cities and towns named in Clause 5 of the contract (the itinerary), and some towns could be reached only by "double hauls" over lines other than petitioner's (No. 19, R. 134).

At the time the contract in this case was negotiated and executed, petitioner did not offer any alternative contract to the circus (No. 20, R. 135).

So far as the evidence showed, the transportation charges made, ($12,625.00 plus taxes) were at a profit to petitioner (No. 21, R. 135). The various railroads with which the circus dealt generally solicit the business. (No. 22, R. 135), and to digress to the testimony, according to the witness Davenport, "Chicago & Northwestern never did turn down any" (of this circus business), and "** they come over and ask us to get on their railroad." (R. 78, Davenport).

Finding No. 23:

> "So far as was shown, both the Chicago and North Western Railway and its affiliate railroad hold themselves out to perform the service of transporting circus trains, using the railroad's engines, tracks, facilities and crews, and, in the State of Wisconsin alone, during the years 1949 and 1950, as evidenced by filed tariffs, transported some eleven circus outfits over its lines in that state." (R. 135).

It was the intent of the parties that the contract be performed locally, where the rail hauls would be made, the circus making daily advance payment to petitioner's agents for movement to the next town. (No. 24, R. 135).

On August 10th, 1950, petitioner accepted the circus (at Ishpeming, Michigan, R. 10), the railroad using its own personnel, facilities and motive power, and continued to handle the train over its lines (No. 25, R. 136). The circus neither had nor

attempted to exercise any control over the dispatching of the train, its movement or switching operations; gave no instructions to the railroad employees, had no control over them, nor the motive power, and the railroad employees were in fact the employees of the railroad, responsible to their superiors in all matters, as well as in the matter of inspecting the train (No. 26, R. 136).

The circus relied on the railroad to make proper inspections of the cars and repairs thereto, and stood currently ready to compensate petitioner for costs of any such repairs. (No. 27, R. 136). In this regard, petitioner railroad assumed the duty to make necessary inspections, and reserved the right to reject any of the rolling stock which was in a defective condition. (No. 28, R. 136).

To digress, there was no evidence that when petitioner accepted the equipment on August 10th, 1950, Car 83, *at that time*, had a defective grab iron.

Prior to the injury to Hugunin on August 16th, 1950, the railroad had not exercised its right to reject the particular car in question, nor had it notified the circus that the car had a defective grab iron, nor had it made a repair of the grab iron. "If this particular car and the subject appliance had been subjected to any inspection by the railroad, the nature of such inspection was not proven by plaintiff, nor otherwise shown by the evidence (oth-

er than by testimony of Chester Hugunin)." (No. 29, R. 136) Parenthetically, it is here noted that Hugunin was not an inspector, but a yardman or switchman (R. 62).

At the time of Hugunin's injury, he had not been warned that the grab iron was defective, nor had the car been taken out of service by the railroad (No. 30, R. 137). Hugunin was not being transported by the circus train, but in the scope of his employment with the railroad, under supervision of his superiors, and in furtherance of the railroad's business, climbed the ladder of Car 83, the grab iron pulled loose, and he fell (No. 31, R. 137). This was on August 16th, 1950, at Antigo, Wisconsin (No. 5, R. 131).

Petitioner stated in open court during the trial that if the circus had not executed "our standard form of contract" that "we would not have accepted their circus for hauling" (R. 89).

According to the only evidence on the point, the railroad makes the rates, "there is no bargaining to it," there is a minimum charge on a fifty-mile basis, and this applies everywhere, (i.e., over all lines in the United States) (R. pp. 72, 73). This flat minimum is apparently $769.00 plus tax (*vide*, contract, R. pp. 10-11).

No operating witness testified for petitioner. The type and extent of inspections, if any, was not prov-

en by petitioner, nor is there any evidence that Car 83 (as distinguished from the train) was ever given any inspection. As observed by the Circut Court of Appeals (202 F. 2d 589 at 592):

> "The contract between the Railroad and the Circus was filed with the Public Service Commission of Wisconsin, and it may be added to the facts found by the District Court that the contracts for the transportation of other circus outfits which appear in the record show that such contracts were filed not only with the State Commission but also with the Interstate Commerce Commission, and were stated to be 'issued under authority of Rule 63, Tariff Circular 20, of the Interstate Commerce Commission.'"

Referencing that portion of Clause No. 6 of the contract (R. 11-12) declaring the railroad's employees to be "deemed to be the servants" of the circus, the trial court concluded, (R. 139):

> "This Court gives no effect to those provisions in the contract which seek, by declaration, to make the railroad's employees the employees of the circus. The circumstances of the transaction and actual relations of the parties show conclusively that Hugunin was in no sense an employee of the circus."

Concerning that portion of Clause No. 3 of the contract (R. 9), giving the railroad the right to inspect and reject equipment, but declaring that the railroad was under no duty to inspect, the trial court concluded, (R. 146):

> "The condition of the record is such that this Court cannot say that a proper inspection would not have revealed the defective grab iron. It was the railroad, and not the circus, which had the personnel and equipment for the making of inspections and repairs, for which last service the circus stood ready to pay."

The Court of Appeals specifically observed (205 F. 2d at 596):

> "Under the findings of fact of the District Court, which we find amply supported by the record, the appellant Railroad acted as a common carrier in the transportation of the Circus and hence, is not entitled to indemnity against the damages paid by it on account of the injuries suffered by the Railroad employee."

In closing this Statement, respondent Hammill points out that petitioner's description of the circus train consist, routing and scheduling is hardly supported by the record (Petitioner's brief, p. 2). Petitioner's statement concerning inquiries made to it by other railroads, as to the decision below, is wholly outside the record. (Petitioner's brief, p. 26).

SUMMARY OF ARGUMENT

I.

Law Applicable

(1) The complaint sought indemnity under the contract, alleging Federal jurisdiction on diversity

of citizenship only, and raising no "federal question." The plaintiff's claim itself must present a "federal question", unaided by anything in defendant's answer. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 94 L. ed. 1194, 1200. As to petitioner, "federal questions" were waived. *M. K. T. R. Co.* v. *Sealy*, 248 U.S. 365, 63 L. ed. 296, 299; *Barron & Holtzoff*, Fed. Prac. & Pro. §25, p. 52.

(2) Petitioner, in its brief in the Court of Appeals (brief, p. 25) admitted that the Carmack Amendment (49 U.S.C.A. § 20) applied to the contract. The Court of Appeals struck down the contract as violative of the Interstate Commerce Act (49 U.S.C.A. §§ 1, et seq.).

(3) If Federal statutes and rules have fully pre-empted the field, the question of applicable law might terminate. If the field is not pre-empted in a case of this kind further inquiry is necessary.

(4) Petitioner having failed to raise a "federal question," and this being a diversity case, 28 U.S. C.A. §1652 and *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 82 L. ed. 1188, 1194 may apply. Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit. *Gully* v. *First Nat. Bank*, 299 U.S. 109, 115, 81 L. ed. 70, 73. A case under federal law does not arise against a railroad engaging in interstate commerce from that mere fact. *Matter of Reisenberg*, 208 U.S. 90, 52 L. ed. 403, 412. The act may violate both federal and state law. *Gully* v. *First Nat. Bank*, supra;

California v. *Zook*, 336 U.S. 725, 93 L. ed. 1005, 1010. A violation of the Federal Safety Appliance Act does not necessarily raise a "federal question." *Fairport, P. & E. R. Co.* v. *Meredith*, 292 U.S. 589, 78 L. ed. 1446, 1451.

(5) Generally, on questions concerning constructions of contracts, their validity, and commercial transactions, the state decisions are followed. 54 Am. Jur. § 356, p. 980; *Wichita Royalty Co.* v. *Bank*, 306 U.S. 103, 83 L. ed. 515, Anno., p. 519; and as a diversity case, the contract might well be tested by the law and policy of the forum—Texas. *Griffin* v. *McCoach*, 313 U.S. 498, 85 L. ed. 1481, 134 A.L. R. 1468. And in a diversity case, conflict of laws rules of the forum are applicable. *Williams* v. *Green Bay & W. R. Co.*, 326 U.S. 549, 90 L. ed. 311, 314; *Klaxon Co.* v. *Stentor Elect. Mfg. Co.*, 313 U.S. 487, 85 L. ed. 1477; cf. 21 A.L.R. 2d 247.

(6) In the forum, foreign contracts violative of public policy will not be enforced 9 Texas Juris. § 4, p. 356; *B & L. Assn of Dakota* v. *Griffin*, 90 Tex. 480, 39 S. W. 656; a contract void where made is void everywhere. *Rue* v. *M. P. R. Co.*, 74 Tex. 474, 8 S. W. 533.

(7) It having been found that it was the intent of the parties to perform the contract locally (Finding No. 24, R. 135), the forum would apply the local laws of Wisconsin and Michigan. *Cockburn* vs. *O'Meara*, 5th Cir., 141 F. 2d 779; 9 Tex. Jur. §119,

p. 407; 72 A. L. R. 250. Subject, however, to the rule that a contract violating the public policy of the forum will not be enforced. 57 A. L. R. 175. The pertinent laws of the states appear in the Appendix, (post).

Construction of the Contract

(1) This is the first reported attempt of a railroad to construe the contract to cover *indemmity;* all decisions have interpreted and applied the contract *defensively* in behalf of the railroad to escape liability for damages to circus property or personnel. e. g., *Maucher* v. *Chicago, R. I. & P. R. Co.* (Neb.) 159 N. W. 422; *McCree* v. *Davis,* etc., 280 F. 959; *Sasinowski* v. *Boston & M. R. Co.,* 1st Cir. 74 F. 2d 628; *Bernardi, etc.* v. *B. & M. R. Co.,* (N. H.) 165 A. 124. Such usages and interpretations are pertinent. 12 Am. Jur., Contracts, §§237, 238, p. 762, et seq. Obscure and hidden meanings are not to be sought for. *T. & P. R. Co.* v. *Reiss,* 183 U. S. 621, 46 L. ed. 358, 361.

(2) The first sentence of Clause 6 is one of *release* only. The railroad cannot contract to be released from its liability to its employees. 45 U.S.C.A. §55. The first sentence must be so interpreted to give it validity. 12 Am. Jur., Contracts, § 251, p. 793.

(3) The second sentence is one of *indemnity,* but only as to the matters stated in the first sentence, by application of *ejusdem generis. Alabama* v. *Montague,* 117 U. S. 602, 29 L. ed. 1000; Words &

Phrases, Perm. Ed., Vol. 3, p. 643, et seq., (also p. 621 et seq.); Lewis Sutherland, Statutory Construction, Vol. 2, § 422.

(4) Contracts drawn by a carrier are construed in favor of the shipper. 8 Tex. Jur., Carriers, §210, p. 315; 9 Am. Jur., Carriers, §769, p. 897. There is a difference between a release and an indemnity. *Halliburton Oil Well Cementing Co.* v. *Paulk*, 5th Cir., 180 F. 2d 79, cert. den, 340 U. S. 812. Indemnity contracts are to be strictly construed against the maker. *Mostyn* v. *Delaware*, L. & W. R. Co., 2nd Cir., 160 F. 2d 15; *U. S.* v. *Wallace*, 9th Cir. 18 F. 2d 20; *C. & N. W. R. Co.* v. *Chicago Packeged Fuel Co.*, 7th Cir., 195 F. 2d 467, cert. den. 73 S. Ct. 39; *Renfro Drug Co.* v. *Lewis* (Tex. Sup. Ct.) 235 S. W. 2d 609; *St. L. & S. W. R. Co.* v. *Arnold*, (Tex. Civ. App.) 74 S. W. 819 (cited, 175 A. L. R. 146); *Westinghouse Elec. Elev. Co. v. La Salle Monroe., Bldg., Corp.* (Sup. Ct. Ill) 70 N. E. 2d 604.

III

Invalidity of the Contract

(1) In dealing with the circus, petitioner acted in the capacities of a railroad and a common carrier. 49 U. S. C. A. §§ 1 et seq.; 45 U. S. C. A. § 1, et seq.; Code of Fed. Regs., Title 49, Secs. 141. 63, 145. 63; *U. S.* v. *California*, 297 U. S. 175, 80 L. ed. 567; *So. Pac. Co.* v. *Arizona*, 249 U. S. 472, 63 L. ed. 713, affirming 19 Ariz. 20, 165 Pac. 303; *State ex. rel., etc.* v. *Kuykendall*, et al., 275 U. S. 207, 72 L. ed.

241, 245; *Bernardi Greater Shows, Inc.* v. *B. & M. R. Co.* (Sup. Ct. N. H.) 165 A. 124; *A. T. & S. F. R. Co.* v. *State* (Sup. Ct. Okla.) 206 P. 252; *Maucher* v. *Chicago*, R. I. & P. R. Co. (Neb. Sup. Ct.) 159 N. W. 422, appeal dism., 248 U. S. 359, 63 L. ed. 294; *Chappelle* v. *L. & N. R. Co.*, 19 I. C. C. 56, and 456; *Coma* v. *St. L. S. F. R. Co. et al.* 74 I. C. C. 400; *Crane* v. *Ry. Exp. Agency, et al.* (Sup Ct. Ill) 15 N. E. 2d 866, 870; *Mayhew* v. *McFarland*, (Tex. Sup. Ct.) 153 S. W. 2d 428, 431; 9 Am. Jur., Carriers, § 4, p. 430, and § 771, p. 898. Nor do any proper grounds exist for setting aside the facts so found. *U. S.* v. *Nat'l. Assoc. R. E. B.*, 339 U. S. 485, 94 L. ed., 1007, 1016.

(2) The railroad cannot, by contract, change its identity, or the nature of what it does. *N. Y. C. R. R. Co.* v. *Lockwood*, 17 Wall. (U. S.) 357, 21 L. ed. 627, 639; *M. P. R. Co.* v. *Ivey* (Tex. Sup. Ct.) 95 S. W. 346; 24 Michigan Law Review, 186; 9 Am. Jur., § 13, p. 437;

(3) Petitioner's authorities are distinguishable as cases (a), where no evidence existed to show a common carrier relationship e. g., *C. M. & S. & P. R. Co. v. Wallace*, 66 F. 506; or (b), the railroad acted in a proprietary and private capacity, and not as a carrier, e. g., *Santa Fe & P. R. Co.* v. *Grant Bros. Const. Co.* 228 U. S. 177, 57 L. ed. 787.

(4) As insisted by petitioner, (and found by the Court of Appeals), the Interstate Commerce Act and the Carmack Amendment apply to this contract. 49

U. S. C. A., § 1, et seq. The provision of indemnity was exacted as a condition to the acceptance for movement of the property provided for in the contract, in violation of 49 U. S. C. A. § 20 (11), (cf. *Chicago, R. I. & P. Ry. Co.* v. *Maucher*, 248 U. S. 359, 63 L. ed. 294; *Bernardi Greater Shows* v. *Boston & M. Ry. Co.*, 86 N. H. 146; 165 A. 124, second appeal, 1 A 2d 360; *Southern Pacific Co.* v. *Arizona*, 249 U. S. 472, 63 L. ed. 713). The contract violates the spirit and prohibitions of 49 U. S. C. A., § 1, § 3, § 8 and 9, § 10 and § 20 (11). *Adams Exp. Co.* v. *Croninger*, 226 U. S. 491, 57 L. ed. 314.

(5) Petitioner's duty to comply with the Safety Appliance Act (45 USCA §§ 4, et seq.) was absolute, nor could this duty be contracted away. *Myers* v. *Reading Co.* 331 U. S. 477, 91 L. ed 1615; *T. & P. R. Co.* v. *Archibald* 170 U. S. 665, 42 L. ed. 1188; Elliott on Railroads (3rd ed.) § 1997, p. 315; 74 C. J. S. § 425 a. p. 1000. This duty extended to cars of others. 74 C.J.S. p. 1000; *So. Kan. R. Co. of Tex.* v. *Sage*, (Tex. Sup. Ct.) 84 S. W. 814, 815, The burden of proving proper inspection was on petitioner. *Rowe* v. *C. & S. R. Co.* (Tex. Civ. App.) 205 S. W. 731, writ ref.; 10 Am. Jur. § 1623, p. 366; 20 Am. Jur. § 187, p. 192.

(6) Petitioner acted unlawfully in hauling a defective car, *St. L. & S. W. R. Co. of Texas vs. U. S. 5th Cir.* 29 F 2d 568, and as an attempt to contract away the results thereof and its duties of inspection, the contract is void. 42 C.J.S. § 7, p. 572; Williston

on Contracts (Rev. ed.) Vol .6, § 1751, p. 4960: *Mass. Bonding & Ins. Co.* v. *Gottliev* (Tex. Com. App.) 15 SW 2d 1020; 27 Am. Jur. § 11, p. 461; *Miller* v. *Long-Bell Lbr. Co.* (Tex. Sup. Ct.) 222 S. W. 2d 244; Stumberg, Conflict of Laws, (2d ed.) p. 266.

(7) Carriers cannot contract away their liability for negligence. *Union Pacific R. Co.* v. *Burke*, 255 U. S. 317, 65 L. ed. 656, 659; *Phillipine Air Lines* v. *Texas Eng. & Mfg. Co.* 5th Cir. 181 F. 2d 923. Elliott on Railroads (3rd ed.) § 443, p. 680; 27 Am. Jur. § 9, p. 460.

(8) Petitioner had no right to indemnity under the comon law. *Union Stock Yards Co. of Omaha* v. *C. B. & Q. R. Co.*, 196 U. S. 217, 49 L. ed. 453.

(9) If Federal statutes did not pre-empt the field, then, by the laws of all the states concerned, petitioner, *as a railroad and without regard to its status as a common carrier*, cannot, as a prerequisite to the haul, demand indemnity or abrogate or shift its common law liabilities. Illinois Const. Art. XI, Sec. 12; Illinois R. S. Ch. 27, § 1, Ch. 111⅔, Sec. 10, et seq., (Appendix, Post); Wisconsin Statutes, Secs. 192. 50, 195. 11, 195. 12, 195. 15, 192. 43 (Appendix, post; Const. of Texas, Art. X, § 2; R. C. S. of Texas, Arts 882, 883, 6360, (Appendix post.) Nor in Michigan, by printed contract, such as this. 3 C. L. Michigan, 467. 151 (Appendix, post).

(10) The contract violates the public policy of the forum. Const. of Texas, Art. X, § 2, Art. 883; *I. & G. N. R. Co.* v. *Vandeventer*, (Tex. Civ. App.) 107 S. W., 560 writ ref.; *Mo. Pac. R. Co.* v. *Fagan*, (Tex. Sup, Ct.) 9 S. W. 749; *St. L. S. W. R. Co. of Tex.* v. *McIntyre*, (Tex. Civ. App.) 82 S. W. 346; *Ft. W. & D. C. R. Co.* v. *Hunt* (Tex. Civ. App.) 258 S. W. 593; 8 Tex. Jur. Carriers, § 15, p. 49, § 16, p. 50, § 64, p. 118.

ARGUMENT

I.

Law Applicable

Petitioner expressly admitted, at page 25 of its brief in the Court of Appeals, that the Carmack Amendment (49 U. S. C. A. § 20) applied to the subject contract and the property moving thereunder. Upon this point respondent agrees. The Act does not apply in part, but *in toto*. 49 U.S.C.A. § 1, Duty to Transport; § 3, Avoidance of Preferences; §§ 8 and 9, Liability to Those Damaged; § 10, Discrimination and Violation of Commission Regulations; § 20 (11), Limitation of Liability. Adams Express Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314. *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U. S. 173, 87 L. ed. 165; *C. & O. R. Co.* v. *Martin*, 283 U. S. 209, 75 L. ed. 983. Code of Fed. Regs., Title 49, § 141. 63 (Appendix, *post.*)

It is also patent that petitioner's activities were

wholly subject to the Safety Appliance Act. (45 U.S. C.A. §§ 4, 6, 8 and 11, Appendix, *post.*)

The underlying fallacy of petitioner's position is this: that it cannot, in one breath, say that the transaction is governed by the Interstate Commerce Act, and in the next, that the transaction is not subject to all of the prohibitions and restrictions of the Act. Congress has either pre-empted the field or it has not. "There is no Federal general common law." *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, 82 L. ed. 1188, 1194.

On the other hand, it is to be noted that the trial court found it to be the intention of the parties that the contract was to be executed *locally* (R. 135). This was a diversity case, and no "federal question" was presented. *Skelly Oil Co.* v. *Phillips Pet. Co.*, 339 U. S. 667, 94 L. ed. 1194, 1200. The ultimate question being one of liability for indemnity, it may be considered that the collateral matter of whether the contract violates Federal law does not necessarily render wholly inapplicable otherwise pertinent State laws, particularly in the absence of any conflict between the Federal and State laws. California v. Zook, 336 U. S. 725, 93 L. ed. 1005 at 1010:

> " '****the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the State and Federal governments, and might draw to its commission the penalties denounced

by either, as appropriate to its character in reference to each.'"

Considering the matter of tug boat inspections, this Court said, in *Kelly* v. *Washington*, 302 U. S. 1, 82 L. ed. 3, 10:

> "There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced."

It was during the same term of Court (October, 1937), that the decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 82 L ed. 1188 was announced.

It is interesting to note that petitioner's sole modern authority, i. e. by a Federal Court, *Sasinowski* v. *Boston, & M. R. R. 1st Cir.*, 74 F. 2d 628, states, of a contract of the class here involved, and one providing for movement between the states of New Hampshire, Massachusetts and Vermont, that it is "clearly a Massachusetts contract, and its validity is to be determined by the law of that commonwealth." (74 F. 2d p. 631).

It is nowise disputed that Federal courts have paramount authority to determine applicability of Federal law to a contract. 28 U.S.C.A. § 1652. We find, however, nothing in the Interstate Commerce

Act which sanctifies or otherwise blesses a contract such as the one in issue. Therefore, the question is not whether conflicting state law shall be disregarded. Rather, the question is narrowed to this: shall the contract be struck down as violative of Federal statutes, or may it be declared violative of both Federal and State statutes, there being no real conflict between them? Herein seems to lie the only difference between th views of the District Court and the Court of Appeals.

The law of the forum is summarized thus: a contract void where made is void everywhere. *Rue* v. *M. P. R. Co.*, 74 Tex. 474, 8 S. W. 533. A contract violating public policy of the forum will not be enforced. 9 Tex. Jur., § 4, p. 356 (citing *B. & L. Assn. of Dakota* v. *Griffin*, 90 Tex. 480, 39 S. W. 656; *T. & P. R. Co.* v. *Richards*, 68 Tex. 375. 4 S. W. 627); 10 Tex. Jur. § 110, p. 191: "The established public policy of the forum is supreme; it will not be relaxed on the ground of comity to enforce a contract which contravenes such policy, even though the contract is valid where made.****." Reviewing the Texas statute prohibiting railroad limitations against liability, the court, in *I. & G. N. R. Co.* v. *Vandeventer* (Tex. Civ. App.) 107 S. W. 560, writ ref., noting that the statute applied only to local shipments, observed:

> "Therefore, while this statute could not effect an interstate shipment, it may be looked to, with the decisions of our courts, as establishing a

policy within this state restrictive of the right of the carrier by contract to avoid liability for its negligence. This is well illustrated in Railway v. Hughes, 191 U.S. 484, 24 S. Ct. 132, 48 L. ed. 268, where it is in effect held that the statutes of a state or the judicial decisions of its courts may create and mould the policy of the state upon a given subject.****."

As a conflict of laws question (cf. *Williams* v. *Green Bay & W. R. Co.*, 326 U. S. 549, 90 L. ed. 311, 314), and subject to the above rules, considering the intent of the parties, the forum would apply the law of the place of performance. *Cockburn* v. *O'Meara*, 5th Cir., 141 F 2d 779; 9 Tex. Jur. § 10, p. 362; 11 Am. Jur. Conflict of Laws, § 19, p. 407; Annotation, 72 A.L.R. p. 250. The laws of the several states involved appear in the Appendix, *post*.

II.

Construction of the Contract

Pertinent portions of Clause 6 of the contract are as follows (R. 11):

"The liability of the respective parties hereto *as to all persons and property transported or to be transported* *** or coming upon the premises of the railroad company *in connection therewith*, or otherwise *in connection with the business of party of the second part, shall be governed by the provisions hereof*, ***; and party

of the second part hereby fully releases and discharges the said railway company from, and agrees that the said railway company shall not be liable to the said party of the second part, nor to any person or persons, cars or property to be or which may be transported hereunder, or otherwise may be upon said train or upon the railway company's premises, which may be coused by any defect in the railroad tracks, etc. ***, or unsuitableness thereof for such transportation, or by the negligence of said*** employees of the railway company, ***, or arising from any cause whatsoever. Party of the second part hereby further covenants and agrees to protect, indemnify and forever hold free and harmless the said party of the first part from any and all liability, loss, judgments, costs and expenses whatsoever, arising from or in connection with claims or suits for damages *on account of any such injury or damage.*" (Emphasis ours).

Neither of the courts below were willing to declare that the contract provided indemnity as claimed by petitioner. "It is questionable whether the contract should be construed to cover indemnity for damages paid on account of injury suffered by railroad employees." (C. A. Op., 205 F. 2d. at 594). The trial court observed, Conclusion No. 5, R. p. 139:

> "The contract nowhere names, among those against whose claims the circus is to indemnify

> the railroad, the railroad's own employees, ****. If the parties had intended an application of the contract as contended for by plaintiff they could have so written it. Renfro Drug Co. v. Lewis (Sup. Ct. Tex.) 235 S. W. 2d 609, 624. *****."

And where a meaning was clear, this Court said, in *T. & P. R. Co.* v. *Reiss*, 183 U.S. 621, 46 L. ed. 358, 361:

> "No rule of construction binds us to find some hidden or obscure meaning for a particular clause, ******."

Trade usage and customs are often pertinent, and "A special, fixed and widely accepted trade meaning will be followed". 12 Am. Jur., Contracts, § 237, p. 762.

It is deemed especially significant that this is the first reported attempt to construe the contract to cover *indemnity* to the railroad in a case of this kind—all decisions are cases where the railroad has asked that the contract be applied to defeat a cause of action brought by circus people for personal injury or damage to property. The Court of Appeals lists the cases in foot note No. 2, p. 594 of its opinion in 205 F. 2d 589.

Thus, the decisions run in these two general categories, as to which typical cases are: (a) circus employees, the Sasinowski Case, 74F. 2d 628; McCree

Case, 280 F. 959; Clough Case, 155 F. 81; Sager Case, 166 F. 526; Maucher Case, 159 N. W. 422; Robertson Case, 31 N. E. 650; Sabol Case, 238 N. W. 281; and (b) circus property, or property and circus employees, Bernardi Cases, 165 A. 124 and 1 A. 2d 360; Wallace Case, 66 F. 506; Forepaugh Case, 18 A. 503.

Indeed, the courts have announced that this was the purpose of such a provision. In *Sasinowski* v. *Boston & M. R. Co.*., 1st Cir., 74F. 2d 628, at 634:

> "There can be little question as to what the purpose and intent of the parties was in entering into this agreement. ******; and an important consideration of the railroad in furnishing the means of transportation was to be relieved of all liability for negligence, either to the show or to its employees.***"

And from the case of *McCree* v. *Davis etc.*, 280 F. 959:

> "This court is therefore, of the opinion that paragraph 5 of this contract must be construed as a release of this railway company from all damages to persons and property of the employees of this circus company caused by the ordinary negligence of any one of the employees of the railroad company, and etc.*."

From *Bernardi, etc.* v. *Boston & M. R. Co.* (N.

H.) 14A. 2d 1, the court, as to the indemnity provision said:

> "The show company is bound to indemnify the Railroad against liability for damages to persons rightfully *riding upon the train and* property transported thereon." (emphasis ours)

As found by the District Court "Hugunin was not being transported by the circus train, nor was he engaged in the business of the circus****." (No. 31, R. 137). Hugunin himself stated that he was not being hauled anywhere and did not intend to ride the train (R. 103).

Clause 7 of the contract clearly provides for indemnity to the railroad for damage to any railroad property. But this is not true of Clause 6 as regards indemnity for damages paid a railroad employee. The entire first sentence sounds in terms of persons connected with the circus, or doing business with the circus, or being transported (as a part of the circus operation).

Petitioner admitted in its brief in the Court of Appeals (p. 33) that it "did not and is not seeking to avoid or exempt itself from its liability to Hugunin****."

Beyond doubt then, petitioner itself construed Clause 6 as not covering a *release* of railroad liability to railroad employees. Such an attempt to so

write the first sentence of Clause 6 would have been wholly void. 45 U.S.C.A. §55 (Contract exempting from Liability). And the first sentence of Clause 6 must be so interpreted to give it validity. 12 Am. Jur., Contracts, § 251, p, 793.

Clause 6 contains two sentences. The first is a sentence for *release*, the second in a sentence for *indemnity*.

> "There is a material difference between a provision disclaiming responsibility**** and an agreement to indemnify." Halliburton Oil Well Cementing Co. v. Paulk, 5th Cir., 180 F. 2d 79, cert. den., 340 U. S. 812.

By the second sentence, the circus agreed to *indemnify* only as to the liability, loss, etc. "arising from or in connection with claims or suits for damages *on account of any such injury or damage.*" (emphasis ours).

By application of *ejusdem generis*, the agreement to indemnify is limited to the matters and liabilities released in the first, or preceding sentence. *Alabama* v. *Montague*, 117 U. S. 602, 29 L. ed. 1000. "In other words, where general words follow the enumeration of particular classes of persons or things, the general words will be interpreted as applicable only to persons or things of the same general nature or class as those enumerated," 12 Am. Jur. § 244, p. 779. And the phrase "any such", when used as

here, is a phrase of restricted reference to the named class, as shown by various decisions reported, Words & Phrases, Perm. Ed., Vol. 3, p. 643. The rule is the same in construing statutes. Lewis Sutherland, Statutory Construction, Vol. 2, § 422.

The rule of construction is against petitioner. 9 Am. Jur., Carriers, §769, p. 897:

> "******it is indubitably established that any limitation of liability by a common carrier in a bill of lading will, in case of ambiguity, be strictly construed, and that construction adopted which is the most favorable to the shipper."

Halliburton Oil Well Cementing Co. v *Paulk*, 5th Cir., 180 F. 2d 79, cert. den., 340 U. S. 812 is illustrative of the situation. There, Francitas Gas Company contracted with the Starrett Company to rework certain wells; Paulk was an employee of Starrett; Starrett in turn called in Halliburton to do a "squeeze job"; one of the Halliburton men negligently bled a valve, injurying Paulk. Paulk recovered judgment against Halliburton, and Halliburton sought indemnity against Francitas on strength of a contract between Halliburton and Francitas. The contract recited that the work of Halliburton would be under exclusive control of Francitas, and Halliburton would not be responsible for damages or losses of any kind, whether resulting from the acts or omissions of Halliburton

or otherwise. The court noted that the Halliburton crew were the only persons having sufficient equipment and skill to perform the squeeze job, and actually no one else had anything to do with the work performed by Halliburton. The court noted Halliburton's contentions that its employee was actually the employee of Francitas perforce the contract, and of this contention said that "the law and the realities of the situation clearly refute it." And, at p. 83:

> "In considering the consequences of such a contract, we look to the circumstances of the transaction, rather than to the form of the paper required as an antecedent to its performance."

The court concluded that Francitas had neither the right nor the ability to control the work, and in fact was forbidden by Haliburton's rules to participate thereon. In reversing the lower judgment awarding indemnity, the Court, p. 84, said:

> "However this may be, we think the work order clearly insufficient to evidence an agreement of indemnity to Halliburton for personal injuries it might negligently inflict in the course of its cementing or squeeze operation. In considering this claim of indemnity we must bear in mind the rule that indemnity agreements are strictly construed against him who claims to be indemnitee. (cases cited). This

> is particularly true where the result would be to indemnify against one's own negligence, and it will not be so construed unless such obligation is expressed in unequivocal terms. (cases cited."

Other cases recite the rule to be the same. Thus, in *Westinghouse Elec. Elev. Co.* v. *La Salle Monroe Bldg. Corp.*, (Sup. Ct. Ill.) 70 N. E. 2d 604, where the elevator company sued for indemnity for death of one of its employees:

> "To adopt this construction of the contract would impose on the contractor the duty to indemnify against injuries entirely without his control, and such should not be adopted in the absence of clear language in the contract including injuries arising from the negligence of appellant's own servants."

In *Mostyn* v. *Delaware, L. & W. R. Co.*, 2nd Cir., 160 F. 2d 15, where the railroad sought indemnity for injury to its employee against a contractor, the court said, p. 18:

> "****but for over ten years and in a series of decisions that court (Court of Appeals, N. Y.) has now laid down what appears to us to be an unswerving canon that if the indemnitee means to throw the loss upon the indemnitor for a fault in which he himself individually shares, he must express that purpose beyond any peradventure of a doubt."

It is noted that petitioner abandons, in his brief before this Court, many authorities urged by it in its brief to the Court of Appeals. Instead, petitioner now seems to contend that it is entitled to recover on the grounds of a breach of warranty.

This is a belated contention, not pleaded in the trial court. There, petitioner claimed "indemnity" under Clause 6 of the contract, and prayed for judgment of indemnity. (R. pp. 6, 7). It did not sue for damages for breach of warranty. Certainly it cannot be contended that the measure of damages for indemnity is the same as that for breach of a sales warranty.

In its brief, filed in the trial court, (p. 6) petitioner said: "The sole question presented ** is whether this Plaintiff, pursuant to the terms of Section 6, **** is entitled to complete indemnity**." Indeed, petitioner does not state the question before the court now as including the matter. (Petitioner's brief, p. 2).

Furthermore, there is absolutely no showing in the record *that when this equipment was presented to petitioner, on August* 10th, 1950, *at Ishpeming, Michigan, same was not in good and proper condition.* The accident did not happen until August 16th, at Antigo. From the headnote in *Lever Bros. Co.* v. *B. & O. R. Co*, 4th Cir., 164 F. 2d 738:

> "Proof that, after railroad car furnished by shipper was loaded with tallow, it remained in

custody of carrier for five days without leakage or notice of defect ***** made out prima facie case of negligence of carrier and placed burden upon it to show that it was not responsible for the loss."

It is our understanding of the law that points not made in the complaint will not be considered on appeal. *Pennsylvania R. Co., et al.* v. *P. U. Comm.* of Ohio, 298 U. S. 170, 80 L. ed., 1130, 1134; *City of New Albany* v. *Burke*, 78 U. S. 96, 20 L. ed. 155; *Kolkey* v. *Grossinger*, 5th Cir. 195 F. 2d 525: "**appellant's counsel puts up a straw man to try to knock him down. ******he devotes his brief to this question, which tendered for the first time here, is not before us for decision."

III.

Invalidity of the Contract

(1) Petitioner's status as a railroad and a common carrier:

The findings of fact of the District Court and the Court of Appeals should be sustained. The reviewing court should give to the findings the ultimate inferences deductible. Barron & Holtzoff, Fed. Prac. & Pro., §§ 1132, 1133. And though the reviewing court might give the facts another construction, this is not grounds for setting aside findings as "clearly erroneous." *U. S.* v. *Nat'l Assoc. R. E. B.*, 339 U. S. 485, 94 L. ed. 1007, 1016.

> "The Interstate Commerce Act applies to the transportation of circuses***." (Code of Fed. Regs., Title 49, § 145.63, Appendix, *post*).

Whether one is a common carrier or not depends "upon what it does." *U. S.* v. *California*, 297 U. S. 175, 80 L ed. 567. And, "Within settled principles, one who undertakes for hire to transport from place to place the property of others who may choose to employ him is a common carrier." *State, ex. rel., etc.* v. *Kuykendall, et al.* 275 U. S. 207, 72 L. ed. 241, 245. "The rule has long prevailed in this State that all persons who transport goods from place to place whether usually or occasionally, whether as principal or incidental occupation, are common carriers, and incur all their responsibilities." *Mayhew* v. *McFarland*, (Tex. Sup. Ct.) 153 S. W. 2d 428, 431.

In affirming jurisdiction of the Commision over private cars hauling theatrical outfits, it was held, in *Chappelle* v. *L. & N. R. Co.*, 19 I.C.C. 456 (affirming its views at 19 I.C.C. 56) that the railroad acted as a common carrier:

> "This was said advisedly and with full appreciation of the cases decided by the courts holding that as to the movement of circus companies a railroad was a private carrier.
>
> "A railroad makes the carriage of goods or persons a business and holds itself out to the public as ready and willing to carry****. We

cannot recognize the right of the defendant to claim exemption from the provision of this law, as to any service which it renders as a carrier of persons or property. If it is a private carrier as to private cars or any class of private cars, it may carry such cars free of charge or at any rate that it may choose, differing and distinguishing between each party or car that it carries. Such construction of the law absolutely nullifies it as to all private equipment, whether carrying passengers or freight. A carrier may no doubt lawfully refuse to carry certain classes of private equipment, but it may not distinguish between private cars that are***owned by Armour & Company and private cars of the same class that are owned by any other concern."

Later, in *Coma* v. *St. L.-S. F. R. Co.*, 74 I.C.C. 400, again directly considering the question, and noting certain of the cases now urged by petitioner, the Commission said:

"While these cases involved consideration of the special contracts, they were generally actions for the recovery of damages based on alleged negligence of the carrier, and the extent of our jurisdiction over the rates, rules, regulations, and practices of the carriers as common carriers was not brought to issue. Moreover, recent amendments to the act to regulate commerce have broadened both the scope of the original act and our jurisdiction and the cases re-

> ferred to, with few exceptions, were decided prior to the 1906 amendment, while the rule of our tariff circular was adopted subsequent thereto.*****."

In *Southern Pacific Co* v. *Arizona*, 249 U. S. 472, 63 L. ed. 713, (affirming 19 Ariz. 20, 165 Pac. 303), this Court said, of the railroad's contention that to force it to haul a circus violated its rights to contract as a private carrier, (63 L. ed. at 716):

> "It would be enough to say of this contention that no such claim was asserted in the answer of the company to the state court, or even in the assignments of error in this court, and that, therefore, it cannot be considered here. But this omission is not an oversight, for the record shows that it has been the prior practice of the plaintiff in error to transport such shows on application under special contract,—a short time before it had transported another show and the year before it had accepted these same shows for transportation.******** affirmed."

In *A. T. & S. F. R.* v. *State* (Sup. Ct. Okla.) 206 Pac. 252, sustaining the right of the state commission to fix rates for circus hauls, the court said, p. 256:

> "We fail to grasp the force of the argument that it was such a service that the railroad companies did not invite or hold themselves out to

do when it is clearly disclosed by the record that they were performing the service and charging therefor what the Commission found to be an unreasonable and exhorbitant rate, and had been so engaged for a number of years, and that they had been making contracts through their agents covering such service and performing same. Hence we say there was not only a holding out on their part to do such service, but that they had actually been doing the same."

In *Maucher* v. *C. R. I. & P. R. Co.* (Sup. Ct. Neb.) 159 N. W. 422, (app. dism., 248 U. S. 359, 63 L. ed. 294), a similiar contract, pleaded defensively by the railroad was struck down, the court noting that if it was within Federal law it was void, and concluding that it was subject to the state law and void, said:

"Perhaps the defendant company might have declined to accept the shipment in the form in which it was offered, but having accepted it and undertaken its transportation, it automatically became a common carrier under the law of this state, and it cannot by private contract exempt itself from the obligations imposed under the Constitution and statutes (authority cited.)

"******Defendant was a common carrier and was rendering the service usually rendered by a common carrier in his transportation, and the contracts pleaded will not avail to exempt it from liability for its negligence."

The distinction in the cases, recognized by the Court of Appeals, is stated in *Bernardi Greater Shows* v. *B. & M. R. Co.* (Sup. Ct. N. H.) 165 A. 124, 130:

> "Consequently, if a case were presented in which it appeared that a railroad had entered this field as a common carrier, the federal decisions mentioned would no longer be in point, and the case would be governed by the rule, which is equally well settled in the federal courts, that a common carrier acting as such cannot, by contract, relieve itself from liability for the negligence of itself or its servants. (authority cited). We think we have before us a case of that kind."

Reviewing certain of the decisions now urged by Petitioner the court further said (p. 130):

> "We think that general acceptance would more readily be accorded to the following statements than to those above quoted: We know from common observation that railroads hold themselves out as common carriers of many kinds of animals, and that such animals are frequently, if not usually, loaded for shipment by their owners; that railroads haul in the usual course of business, and in increasing numbers, private cars of many different kinds, such as coal cars, refrigerator cars and tank cars; that in many parts of the country the practice of running

> mixed trains made up of passenger and freight cars is common, and other property may be transported simultaneously; that railroads are usually glad to operate special trains at the convenience of patrons who are able and willing to pay for such service; and that the safe management of such trains involves no serious difficulties or dangers of operation."

When the case next came before the court on the merits, *there being no evidence* in the record that the railroad was holding itself out to haul circuses, the court modified its former opinion, but firmly said (1 A. 2d 360) "We cannot accept at its face value, however, the declaration in the contract that the railroad did not contract as a carrier, either common or special****. We adhere to our previous opinion that the defendant by this form of words asserted an entirely fictitious relationship between itself and the show company."

This *lack of evidence* before the courts in the decisions by petitioner is a cardinal distinction in the cases. Thus, in *C. M. & St. P. R. Co.* v. *Wallace*, 66 F. 506, 510:

> "There was no evidence offered that the railroad company had ever carried similiar goods for Wallace before in his own private cars, or that it had ever carried or held itself out to carry goods in that manner for others, and there is no presumption that railroad companies would do so."

Petitioner offers no authorities in its favor where the evidence and facts found are similar to the evidence and facts found in this case now before the Court. Contractual declarations to the contrary are no aid to petitioner's case. The Court said, in *N. Y. C. R. R. Co.* v. *Lockwood*, 17 Wall. (U. S.) 357, 21 L. ed. 627, 639:

> "Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes the risk of inevitable accidents in the carriage of goods?"

At 9 Am. Jur., Carriers, § 771, p. 898, by the "great weight of authority**** the common carrier is such by virtue of his occupation", and not by virtue of any contractual declaration. In striking a cattle shipping contract, where the attendant was declared by contract to be a railroad employee, the court, in *M. P. R. Co.* v. *Ivey*, (Tex. Sup. Ct.) 9 S. W. 346, said:

> "It is a pretence, a subterfuge, upon which to predicate the discharge of the company for damages in plausible form. The true relations of the parties cannot be changed by such an agreement. It states a fact which is untrue; the agreement that it is true does not make it so.******

"******We are further of the opinion *** that a railway company cannot by contract lay down its public character as a common carrier of passengers, which the law, as well as the nature of the employment, fixed upon it, and become a private carrier."

At 24 Michigan Law Review, 186: "In any event it is generally recognized that the status of a carrier is determinable by what it elects to do, not by declaration or authorization.****an insistence upon private contract is no unfailing criterion."

Some of the decisions offered by petitioner are from states, where, under its old law, as in Michigan, even carriage of livestock was declared not a common carrier operation. *L. S. & M. S. R. Co.* v. *Perkins*, 25 Mich. 329, 12 Am. St. Rep. 275; cf., *Fordyce* v. *McFlynn*, (Sup. Ct. Ark.) 19 S. W. 961, 962, where the rule is to the contrary, (as is the case generally).

Of the decisions urged by petitioner, it is stated at 4 Williston Contracts (Rev. Ed.) § 1089A, p. 3051:

> "There is, however, a growing reluctance on the part of the courts to enforce such clauses, and this is in harmony with a general trend against contractual exemption from liability for negligence resulting in personal injuries."

Noting of the Sabol Case (238 N. W. 281) and

the McCree Case (280 F. 959), that the courts there chose to define the carrier's acts as wilful negligence (and thus avoid the effect of the contracts), the commentator said, at 30 Michigan Law Review, 979:

> "******it seems entirely inconsistent with sound logic that the private carrier, in whose hands rest the safety of human lives, should be allowed to contract away its liability****. As a matter of sound logic, it should not be necessary to resort to this meaningless classification in order to hold the carrier responsible*****And it is possible that these last cases********represent a tendency to restrict the freedom of the private carrier so to escape liability by special contract."

Sante Fe & P. R. Co. v. *Grant Bros.*, 228 U. S. 177, 57 L. ed. 787 is not in point. That was a case where the railroad contracted not as a carrier, but in its proprietary capacity only, as in the case of spur track agreements. (cf. *Minneapolis-Moline Co.* v. *C. M. St. P. R. Co.*, 8th Cir., 199F. 2d 725); in Texas even an agreement of this type would be invalid if the contract permitted the railroad to relax the diligence of its operation. *M. K. & T. R. Co.* v. *Carter*, (Tex. Sup. Ct.) 68 S. W. 159).

Furthermore, a number of the cases cited by petitioner, to the extent based on local state law, could have no application here. This for the reason that if

state law applies, the state laws set forth in the Appendix would control to strike down such agreements.

Of the cases urged by petitioner it was well observed by the Court of Appeals (205 F. 2d at 595):

> "None of those cases, however, involved a finding of fact, as here, that the Railroad was actually operating as a common carrier of Circus property and was soliciting and holding itself out to perform such service."

(2) Petitioner had no right to demand such a contract:

The distinction was clearly drawn in *Crane* v. *Ry. Exp. Agency, Inc., et al* (Ill. Sup. Ct.) 15 N. E. 2d 866, where attendents accompanying horses in an express car sued the express company and the railroad for injuries; both companies pleaded special contracts releasing them from liability; the defense was declared good by the Court to the express company, it being a carrier only of property, but of the railroad company, said, p. 870:

> "Since the railway company was not acting outside the performance of its duty as a common carrier in carrying plaintiffs as passengers for hire it could not, by contract, immunize itself from negligence. The stipulation exonerating it from liability for its negligence was void."

Again, at 13 C. J. S. Carriers, § 96, p. 185:

> "A provision exempting the carrier from liability for loss from any cause whatever would be against public policy and void as an attempt on the part of a common carrier to relieve itself from its public duties, and, as shown infra § 113 b, as an attempt to relieve itself from the consequences of negligence."

At common law the railroad would have no right to indemnity against one delivering a bad car to it, as a result of which a railroad employee was hurt. *Union Stock Yards Co. of Omaha* v. *C. B. & Q. R. Co.*, 196 U. S. 217, 49 L. ed 453: "We do not think the case comes within that exceptional class which permits one wrongdoer who has been mulcted in damages to recover indemnity or contribution from another."

The doctrine that those whose business is affected with a public interest cannot contract against negligence is recognized in *Phillipine Air Lines* v. *Texas Eng. & Mfg. Co.* 5th Cir., 181 F. 2d 923. The subject is treated extensively at 175 A. L. R. 12. This Court said, in *Union Pacific R. Co.* v. *Burke*, 255 U. S. 317, 65 L. ed. 656, 659:

> "This court has consistently held the law to be that it is against public policy to permit a common carrier to limit its common-law liability by contracting for exemption from the conse-

quences of its own negligence or that of its servants.******."

The rule is also stated: In Elliott on Railroads (3rd Ed.) §443, p. 680; at 8 Tex. Jur., § 15, p. 49, § 64, p. 118; and in *M. P. R. Co.* v. *Fagan* (Tex. Sup. St.) 9 S. W. 749, 751:

> "A common carrier has no right to demand of a shipper a waiver of his rights as a condition precedent to receiving freight. If such a custom should be ever so common and uniform, it could not be sustained, because it, the custom, would be against the law."

When, in order to get his grain moved, the shipper had to agree to make repairs on the cars, the court said, in *Ft. W. & D. R. Co.* v. *Hunt* (Tex. Civ. App.) 258 S. W. 593:

> "When, in order to get his grain shipped, he undertook to do that which the carrier should have done, the railway company ought not thereby to be relieved from its responsibility."

It was upon this line of reasoning that the courts below held the contract violative of 49 U.S.C.A., §§ 1 et. seq.

This court recently held, in *N. Y. N. H. & H. R. Co.* v. *Nothnagle*, 97 L. ed., 882, at 887 (the lost baggage case):

> "But only by granting its customers a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than the actual loss sustained (cases cited) (and, observing of the undisclosed limitation in that case, continued:) *****; such an arrangement would amount to a forbidden attempt to exonerate a carrier from the consequences of its own negligent acts. (cases cited)."

And, without considering petitioner's public duties as a carrier, much authority would strike the contract because the parties had no equality in bargaining power. Petitioner did not offer the circus an alternate contract; the circus could reach some of the towns only over petitioner's lines, and as to other towns, only by double-hauls over other lines. Stipulations against negligence are struck in such instances, as observed at 175 A. L. R. § 6, Relative Bargaining Power, p. 16: "The first leading principle is that contractual exemption from liability for negligence is rarely allowed to stand where the contracting parties are not on roughly equal bargaining terms." And, "Illustrative is the situation where it is necessary for the one party to enter into the contract to obtain something that is of great importance for himself and that he cannot for all practical purposes receive elsewhere." Cf., 27 Am. Jur., § 9, p. 460.

(3) The contract was an illegal attempt by petitioner to bargain away its absolute duties.

Without regard to its status as a common carrier, petitioner, as a railroad, was bound to observe the Federal Safety Appliance Act (45 U. S. C. A., §§ 4, 6, 8 and 11, Appendix, post). Hauling a defective car beyond the first point of repair was, as to the railroad, an unlawful act, subject to penalty. *St. L. & S. W. R. Co. of Texas* v. *U. S.*, 5th Cir., 29 F. 2d 568; 45 U. S. C. A. §§ 4, 6.

Clause 3 of the contract pertains to the respective duties of the parties to make inspections (R. 9): "*** but this provision shall not be held to cast upon the party of the first part the duty to so inspect nor any liability for failure to do so, or to report defects."

Petitioner, in its brief in the Court of Appeals, having stated (p. 26) that "the chances of injury, particularly from latent defects becomes extremely high", then *defined its duties* as to inspections under Clause 3 of the contract to be: "*****this language must be interpreted as merely limiting appellant's duty to appellees *to assist them* in performing *their* undertakings*****." (Petitioner's brief below, p. 29). (emphasis ours).

The fruit born of such an attitude of petitioner toward compliance with the Safety Appliance Act was a serious injury to the railroad's own employee,

for whose benefit the law was passed. *T. & P. R. Co.* v. *Archibald*, 170 U. S. 665, 42 L. ed. 1188.

It was the railroad, not the circus, which had the personnel and equipment to make inspections and repairs, for which service the circus stood ready to pay (Conclusion No. 15, R. 146).

Petitioner's duties under the law were absolute. *Myers* v. *Reading Co.*, 331 U. S. 477, 91 L. ed. 1615; Elliott on Railroads (3rd ed.) § 1997, p. 315. "******nor can the obligation of the railroad under the act be contracted away, as, for example, by the intricacies of an operating contract." 74 C. J. S. § 425 a., p. 1000. By the same authority, its duties extended to cars owned by others.

Clause 3, and petitioner's own admissions, show an overt attempt to lessen its absolute duties and avoid responsibility for compliance with the law. A contract for indemnity against the consequences of an unlawful act is void. 42 C. J. S. § 7, p. 572; *Mass. Bonding & Ins. Co.* v. *Gottlieb*, (Tex. Com. App.) 15 S. W. 2d 1020; and Williston on Contracts, (Rev. Ed.) Vol. 6, § 1751, p. 4960 says:

> "Because of its tendency to promote illegal acts a bargain to save the promisee harmless from consequences of an act which is necessarily unlawful is itself invalid."

In the case of *Brady* v. *Terminal R. Asso.*, 303 U.

S. 10, 82 L. ed. 614, 618, this Court, of the carrier's duty concerning grab irons, said:

> "The duty imposed is an absolute one and the carrier is not excused by any showing of care however assiduous."

(4) The record cannot sustain a conclusion that petitioner had made a proper inspection.

"The condition of the record is such that this Court cannot say that a proper inspection would not have revealed the defective grab iron." (Concl. No. 15, R. 146).

The question of whether the car was inspected was a fact lying peculiarly within the knowledge of the railroad, and the burden of proof rested on it. *Rowe* v. *C. & S. R. Co.* (Tex. Civ. App.) 205 S. W. 731, writ ref. "*****the company must prove that the inspection was made by a competent person, and with such care as an ordinarily prudent man would exercise under like circumstances. *Durkin* v. *Sharp*, 88 N. Y. 229"; *So Kan. R. Co. of Tex.* v. *Sage* (Tex. Sup. Ct.) 84 S. W. 814 at 815.

There was no showing that *this car* was ever inspected. No operating witness for petitioner testified on the point. Petitioner offered a letter of one of its attorneys that the train was inspected at Green Bay, which stated 'no special method of inspection is required.' If such be the custom of petitioner, such

can be of little comfort to it. 68 A. L. R. 1418, 1421. And the presumption is that petitioner was negligent—*res ipsa loquitur*—10 Am. Jur., § 1623, p. 366. Failure of petitioner to call proper witnesses on this issue should resolve all inferences against it. 20 Am. Jur., § 187, p. 192.

T. & P. R. Co. v. *Archibald*, cited, supra (42 L. ed. 1188), reannounced the rule that the duty of inspection applied to foreign cars, and affirmed a verdict of improper inspection where, as here, there as a similiar minimum of proof showing proper inspection. In the latter Bernardi Case, supra (1 A. 2d 360, on generally similar evidence, the court concluded that a finding of inadequate inspection might be made.

As the record stands, not only did petitioner attempt to contract away its absolute duties, but with an affirmative showing of negligence on its part, seeks idemnity for the damages resulting therefrom. This should not be allowed.

(5) Application of the laws of the various states concerned renders the contract wholly void.

In Texas (Appendix, *post*, p. xiv) and in Illinois (Appendix, *post*, p. vii) railroads are declared to be public highways, and by statute, railroads are declared common carriers. In Wisconsin, the usual statutory duties are fixed on "railroads", (as distinguished from "common carriers" (Appendix,

post, p. iii). The law of these states closely parallels that of Nebraska (cf. Maucher v. C. R. I. & P. R. Co., (Neb.) 159 N. W. 422, appeal dism., 63 L. ed. 294, supra).

Therefore, if petitioner's authority, the Sasinowski Case (74 F. 2d 628), is correct in applying local law, as it did, then, by application of the local law of any of these instant states, the contract is also void, because the statutory prohibitions exist against petitioner as a *railroad*, and without regard to its status as a *common carrier* under common law concepts. *Ft. W. & D. C. R. Co.* v. *Rogers*, (Tex. Civ. App.) 53 S.W. 366, no writ: "Our Constitution declares all railroads 'public highways', and all railroad companies 'common carriers'." From 8 Tex. Jur., § 16, p. 50:

> "The duty of a railroad to receive and carry goods is somewhat more onerous than that resting upon other common carriers, for, as we have heretofore observed, it must carry all such property as is commonly carried by railroads, ***."

Based on the authorities cited, it is submitted that the contract clearly violates the laws and public policies of the place where it was made, (Illinois), the place where the injury occurred, (Wisconsin), and the law of the forum (Texas).

This is petitioner's dilemma: recognizing the invalidity of the contract when tested by local law, it must then contend that Congress has pre-empted

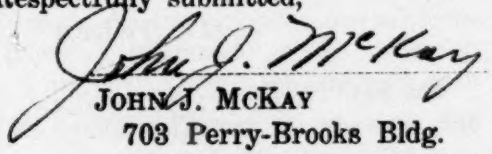
the field by the Interstate Commerce Act; but to avoid the prohibitions of that Act, must contend, in essence, that by federal common law, its conduct is validated. Petitioner cites the Western Union Telegraph Co. Case, 181 U.S. 92, 45 L. ed 764. Anything in that early case is controlled now by Erie R. Co. v. Tompkins: "There is no federal general common law." If the field is pre-empted, this is so by Acts of Congress, and not by "Federal common law." The law that pre-empted the field in *Garrett* v. *Moore-McCormack*, 317 U.S. 239, 87 L. ed. 239, was the Merchant Marine (Jones) Act; in *Dice* v. *Akron, C. & Y. R. Co.*, 342 U.S. 359, 96 L. ed. 398, it was the Federal Employers' Liability Act, and the actions brought were brought upon those Acts of Congress.

CONCLUSION

The contract cannot properly be construed to give indemnity as claimed by petitioner. But if it were subject to such construction, then the contract would be void, as in violation of the Interstate Commerce Act and Federal public policy; and to the extent that the field is not occupied by Federal law, the contract would be in violation of the laws of the place of making, place of performance and the forum. The petitioner seeks indemnity under the contract for

conduct which violated the Federal Safety Appliance Act. The writ of certiorari should be denied.

Respectfully submitted,



JOHN J. MCKAY
703 Perry-Brooks Bldg.
Austin, Texas
Attorney for Respondent,
Harry A. Hammill

APPENDIX

I.

STATUTES

(1) Federal

The Federal Employers Liability Act, 45 U.S.C.A. §51, provides in part that every railroad while engaged in commerce between the states, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, and 45 U.S.C.A. §55 provides in part that:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void, provided, etc.***."

The Federal Safety Appliances Act, 45 U.S.C.A. §11, requiring safety appliances for each car, reads, in part:

> "It shall be unlawful for any common carrier subject to the provisions of sections 1-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances for ***; ** all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders; ***."

The Federal Safety Appliance Act, 45 U.S.C.A. §4, provides:

> "Until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

The same Act, 45 U.S.C.A. §6, provides penalties for violations of the act by "common carriers engaged in interstate commerce by railroad using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the preceding provisions of this chapter.

The same Act, 45 U.S.C.A., §8, provides that the provision relative to grab irons shall be held to "apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith (except those exempted by section 6 of this title)."

(2) Interstate Commerce Commission Rules

Code of Federal Regulations (1949), Title 49—Transportation, Chapter 1—I.C.C.

As applicable to freight service (railroads):

> §141.63. Transportation of Circus Outfits. "Rates for specified movements of circuses and other show outfits may be established on not less than 1 day's notice to the commission. Such tariffs must bear reference to this rule and must publish the charges specifically, showing the number and kind of cars moved, or may consist of a proper title page reading 'as per copy of contract attached', and to it may be attached a copy of the contract under which the circus is moved. Tariffs containing such rates need not be posted at stations. As far as practicable, general rules or regulations governing the fixing of such rates should be regularly published, posted and filed upon statutory notice."

As applicable to motor carrier service (trucks), the same regulation is made, the first sentence, however, reading as follows:

> §145.63. Transportation of circus outfits.
>
> "The Interstate Commerce Act applies to the transportation of circuses and other show outfits, but the Commission recognizes the peculiar nature of this traffic and the difficulty of establishing rates thereon in advance of shippers' request, describing the character and volume of the traffic ordered, etc.***."

(3) Wisconsin

Under Wisconsin Statutes, 1947, Chapter 192:

§50 (192.50) "Every railroad company shall be liable for damages for all injuries whether resulting in death or not, sustained by any of its employees,***.

"(1) When such injury is caused by a defect or insufficiency in any ** car ** or appliance used by its employees in anything about the business of their employment.

*****

"(4) Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any railroad company to exempt itself from any liability created by this section shall to that extent be void; provided *** (proviso allows set-off for payments made).***.

*****

"(6) No contract or receipt between any employee and a railroad company, no rule or regulation promulgated or adopted by such company, and no contract, rule or regulation in regard to any notice to be given by such employee shall exempt such corporation from the full liability imposed by this section.

"(7) The phrase 'railroad company,' as used in this section, shall be taken to embrace any company, association, corporation, or person managing, maintaining, operating or in possession of a railroad in whole or in part within this state whether as owner, contractor, lessee, mortgagee, trustee, assignee or receiver."

195.15 Transportation Contracts Filed. "Every railroad shall, when required and within the time fixed by the Commission, deliver to the Commission, for its use, copies of all contracts which relate to the transportation of persons or property, or any service in connection therewith, made or entered into by it with any other railroad or shipper or other person doing business with it."

Wisconsin Statutes (1947) Chapter 195, §195, et seq., provide for the Public Service Commission, and its control over railroads. Section 195.05 provides that when the Commission shall find that any rate is unjust, unfair, discriminatory or unreasonable, it shall, by order, fix a fair rate, and this section further provides that all railroads shall "make such changes in their schedule on file as may be necessary to make the same conform to said order, and no change shall thereafter be made by any railroad in any such rates, fares or charges, or in any joint rates except as provided in section 195.08.

195.11 Discriminations prohibited. "(1) If any railroad, or any agent, or officer thereof, shall directly or indirectly or by any device whatsoever, charge, demand, collect or receive a greater, less or different compensation for the transportation of persons or property or for any service in connection therewith than that prescribed in the tariffs then in force, or than it charges, demands, collects or receives from any other person, firm or corporation for a like and contemporaneous service, such rail-

road shall be deemed guilty of unjust discrimination which is hereby prohibited."

195.12 Preference by carriers prohibited. "If any railroad shall make or give any undue or unreasonable preference or advantage to any person, firm or corporation, or shall subject any person, firm or corporation to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such railroad shall be deemed guilty of unjust discrimination which is hereby prohibited."

195.22 Provides that the railroads shall furnish suitable cars to all persons for movement of freight in carload lots.

195.24 Provides that railroads shall freely interchange traffic between lines, moving to any point on their own lines, without unreasonable delay or discrimination.

195.36 Fixes penalties on railroads violating any provision of Chapter 195 by fines up to $10,000.00.

192.42 Provides that common carriers receiving freight for intrastate transportation shall issue bills of lading therefor, and shall be liable to the lawful holder thereof for loss or injury, and no contract, receipt, rule or regulation shall exempt the issuer from such liability.

192.43 Liability of Carrier of Passengers Made Absolute. No contract, receipt, rule, or regulation shall exempt any corporation or person engaged in transporting persons for hire, within this state, from the liability of a com-

mon carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation, been made.

(4) Illinois

ILLINOIS CONSTITUTION:

> Article XI, Section 12: "Railways heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the general assembly shall, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state."

Under Illinois Revised Statutes (1949) Chapter 27:

> §1—Be it enacted, etc. "That whenever any property is received by a common carrier, to be transported from one place to another, within or without the state, it shall not be lawful for such carrier to limit his common liability safely to deliver such property at the place to which the same is to be transported by any stipulation or limitation expressed in the receipt given for such property."

Chapter 111 2/3, Sec. 10, defining 'public utility' to include concerns that (a) "May own, control, operate or manage, within the State, directly or in-

directly, for public use, any plant, equipment or property used or to be used for or in connection with the transportation of persons or property***."

And, by (b): "The term 'common carrier,' when used in this Act, includes all railroads,***."

"The term 'railroad' when used in this Act, includes every railroad other than a street railroad, by whatsoever power operated, for public use in the transportation of persons or property for compensation,***."

The same chapter creates the Illinois Commerce Commission, giving it full jurisdiction and power over all public utilites, and,

Section 38. Discrimination forbidden. "No public utility shall, as to rates or other charges, services, facilities or in other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates or other charges, services, facilities, or in any other respect, either as between localities or as between classes of service."

Section 39. Discrimination — Rebates, provides in part as follows: "*** No person or corporation shall, directly or indirectly, by any device or means whatsoever, whether with or without the consent or connivance of a public utility or any of its officers, or employees, seek

to obtain or obtain any service, commodity, or product at less than the rate or other charge then established and in force therefor. ***."

Chapter 114, Sec. 40. Regulate short and long hauls.

Section 44. Interchange of traffic or service. "Every common carrier shall afford all reasonable, proper and equal facilities for the prompt and efficient interchange and transfer of passengers, tonnage and car, loaded or empty, between the lines owned, operated, controlled or leased by it and the lines of every other common carrier, and shall make such interchange and transfer promptly without discrimination between shippers, passegers or carriers either as to compensation charged, service rendered or facilities afforded. (Continues to require every railroad company to receive from other railroads all cars of proper guage and condition, and move them over its lines.)."

Section 52. Gives the Commission control over conditions to be contained in and become a part of contracts for public utility services.

Section 118. Extortion. Provides that if any railroad shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation, "for the transportation of passengers or freight, of any description," or for the use and transportation of any railroad car upon its track, such shall be extortion, and punished accordingly.

Section 119. Prohibits unjust discrimination.

(5) Michigan

3 COMPILED LAWS OF MICHIGAN (1948), 462.3 Common carrier, construed.

Section 3 "(a) The term 'common carrier' as used in this act shall be construed to mean and embrace all corporations, companies, individuals, associations of individuals, their lessees, trustees or receivers appointed by any court etc. *** who now or may hereafter own, operate, manage or control as a common carrier in this state, any railroad or part of any railroad, whether operated by steam, electricity or other motive power, or cars or any other equipment used thereon, *** or switches, spurs, tracks, sidetracks, terminal facilities or any docks, etc. *** and also all freight deports, yards and grounds used or necessary for the transportation or delivery of any said property and whether the same are owned by said railroad or otherwise; *** or any common carrier engaged in the transportation of passengers and property wholly by rail or partly by rail and partly by water.

"(b) The term 'transportation' shall include cars and other vehicles and all instrumentalities of shipment, or carriage irrespective of ownership, or of any contract expressed or implied for the use thereof, and all services in connection with the receipt, delivery, elevation, switching and transfer in transit, ventilation, refrigeration, or icing, storage and handling of persons or property transported.

"(c) The term 'railroad' as used in this act shall be construed to mean all railroads, wheth-

er operated by steam, electric or other motive power; Provided, that the provision of this act shall not apply to any logging or other private railroad not doing business as a common carrier; Provided further, Nothing in this act contained shall be construed to authorize the commission to interfere with, lessen or impair or to authorize the impairment of any franchise provision, contract or agreement as to rate of fare now existing between any municipality, city, village, or township, and any tram railway, street railway, etc.***."

462.4 Common Carrier; duty to serve.

Sec. 4 "(a) Every common carrier is hereby required to furnish reasonably adequate service and facilities and shall provide and furnish transportation of passengers and property, upon reasonable requests thereof, and all charges made for any service in connection therewith, or for the receiving, switching, delivering, storing, transportating or handling of such persons or property shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

462.6 (a) Requires railroads to establish switch connections with private side tracks and perform service under supervision of the Commission.

(b) Requires railroads to provide spur tracks to industrial sites at certain prescribed costs.

462.7 "(a) All railroads subject to the pro-

visions of this act shall afford all reasonable and proper facilities by the establishment of switch connections between one another and the establishment of depots and otherwise for the interchange of traffic between their respective lines and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall transfer and deliver without unreasonable delay or discriminating any freight or cars or passengers destined to any point on its own line or to any connecting line, and shall not discriminate in their rates and charges between such connecting lines: Provided, Precedence may be given to livestock and perishable property.

462.10 "(a) Every common carrier subject to the provisions of this act shall file with the commission created by this act and print and keep open to public inspection in each of the depots, etc. *** schedules showing all rates, fares and charges for transportation, both of passengers and property, between different points on its own route, and between points on its own route and on the route of any other carrier, when a through route and joint rate have been established."

462.11 "Nothing in this act shall be construed to prevent concentration, commodity, transit and other special contract rates, but all such rates shall be open to all shippers for a like kind of traffic under similar circumstances and conditions, and shall be subject to the provisions of this act as to the printing and the filing of the same: Provided, All such rates shall be under the supervision and regulation of the commission."

462.16 Prohibits rate discrimination.

462.17 Traffic discrimination unlawful.

Sec. 17. "It shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality or any particular description of traffic to any undue or unreasonable disadvantage or prejudice in any respect whatsoever."

462.19 Civil Liability.

Sec. 19. If any common carrier shall do, or cause to be done, or permit to be done, any matter, act or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing required to be done by it, or by any lawful order made under the provisions of this act by the Michigan railroad commission, such common carrier shall be liable to the person, firm or corporation injured thereby in double the amount of damages sustained in consequence of such violation: Provided, That any recovery as is in this section provided shall in no manner affect a recovery by the state of the penalty prescribed for such violation.

467.151 Common law liabilities of railroads, changing.

Sec. 1 "That no railroad company shall be permitted to change or limit its common law

liability as a common carrier, by any contract or in any other manner, except by a written contract, none of which shall be printed, which shall be signed by the owner or shipper of the goods or property to be carried."

(6) Texas

CONSTITUTION OF TEXAS, Article X, § 2 (in part):

"Railroads heretofore constructed or which may be constructed in this state are hereby declared public highways, and railroad companies, common carriers. * * *."

Revised Civil Statutes of Texas (Vernon's Anno. Civ. Stat.):

Art. 882:

"The duties and liabilities of carriers in this State and the remedies against them, shall be the same as are prescribed by the common law except where otherwise provided by this title."

Art. 883:

"Railroad companies and other common carriers of goods, wares and merchandise, for hire, within this State, on land, or in boats or vessels on the waters entirely within this State, shall not limit or restrict their liability as it exists at common law, by any general or special notice, or by inserting exceptions in the bill of lading or memorandum given upon the receipt of the goods for transportation, or in any other

manner whatever. No special agreement made in contravention of this Article shall be valid; ***."

Art. 6360:

"In case of the refusal by such corporation (i.e., a railroad corporation) or their agents so to take and transport any passengers or property, or to deliver the same, or either of them, at the regularly appointed time, such corporation shall pay to the party aggrieved all damages which shall be sustained thereby, with costs of suit; etc. ***."

Art. 6439: Liability for injury or death of employee.

(Provides for liability by the railroad to any of its employees for injury or death resulting therefrom)

Art. 6442:

"Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by the three preceding articles shall to that extent be void; provided, etc.***."

FILED
JAN 6 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM A. D. 1953.

No. 460

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

BEN C. DAVENPORT, HARRY A. HAMMILL AND DAILEY BROTHERS CIRCUS, A PARTNERSHIP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

DRENNAN J. SLATER,
400 West Madison Street,
Chicago 6, Illinois,

AMOS M. MATHEWS,
The Association of Western Railways,
280 Union Station Bldg.,
Chicago 6, Illinois,

ARTHUR P. BAGBY,
J. SAM WINTERS,
Brown Building,
Austin, Texas,
Attorneys for Petitioner.

GERALD M. CHAPMAN,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

PAGE

Argument 1

I. The Decision Below Turns Upon an Erroneous Conception of the Qualitative Nature of the Acts to Which Common Carrier Status Attaches..... 2

II. The Status of Petitioner as a Special Carrier of Circus Trains Must Be Determined Under the Applicable Federal Decisions..... 8

III. If the Contract Is Valid, Petitioner Is Entitled to Recover Since Hugunin's Injuries Were Within the Scope of the Indemnity Clause and Respondent Breached Its Warranty Concerning Car No. 83 10

Conclusion 13

AUTHORITIES CITED.

Cases.

Atchison, T. & S. F. Ry. Co. v. State, 206 Pac. 252 (Okla., 1922) 5

Bernardi Greater Shows v. Boston & M. R. Co., 165 Atl. 124, 1 A. (2d) 360..... 6

Booth-Kelly Lumber Co. v. Southern Pacific Co., 183 F. (2d) 902 (C. A. 9th, 1950)..... 8

Chappelle v. L. & N. R. Co., 19 I. C. C. 456 (1910).... 3

Coma v. St. L.-S. F. R. Co., 74 I. C. C. 400 (1922).... 3

Dice v. Akron, Canton & Youngstown R. Co., 342 U. S. 359 (1952) 9

Erie R. Co. v. Tompkins, 304 U. S. 64 (1938)..... 9

Francis v. Southern Pacific Co., 333 U. S. 445 (1948).. 9

Mayhew v. McFarland, 153 S. W. (2d) 428, 431 (Tex., 1941) 4

Minneapolis-Moline Co. v. Chicago, M., St. P. & P. R. Co., 199 F. (2d) 725, 731 (C. A. 8th, 1952)..... 7

O'Brien v. Western Union Telegraph Co., 113 F. (2d) 539, 541 (C. A. 1st, 1940)..... 9

Petroleum Rail Shippers' Assn. v. Alton & S. R., 243 I. C. C. 589, 620 (1941)..... 4

Sasinowski v. Boston & M. R., 74 F. (2d) 628 (C. A. 1st, 1935) 10

Southern Pacific Co. v. Arizona, 249 U. S. 472 (1919).. 5

Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33 (1916). 7

Washington ex rel. Stimson Lumber Co. v. Kuykendall, 275 U. S. 207 (1927)..... 4

Statutes.

Interstate Commerce Act [49 U. S. C. A. § 20 (11)].. 8, 9

Safety Appliance Act (45 U. S. C. § 1 et seq.)..... 7

IN THE

Supreme Court of the United States

OCTOBER TERM A. D. 1953.

No. 460.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

BEN C. DAVENPORT, HARRY A. HAMMILL AND DAILEY BROTHERS CIRCUS, A PARTNERSHIP,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

ARGUMENT.

Despite respondent's lengthy brief, it should be apparent that the crucial issue in this case is whether the Court of Appeals was wrong in its conception of the qualitative nature of the acts to which the legal status of common carrier attaches. Petitioner contends that the court improperly failed to consider the impact of the fact that there was no general holding out to the public at large as being willing to carry all circus trains indiscriminately. A secondary issue, injected by respondent's brief, is the question of gov-

erning law. Petitioner contends that the whole field of transportation by rail in interstate commerce, and more particularly the ability of a railroad to limit its liability, is so completely covered by federal legislation that, in the interests of uniformity of decision, federal decisions must govern. Finally, there is the question raised as to the construction of the contract. In this respect petitioner contends that the contract provides for indemnification under these circumstances. Moreover, petitioner also pleaded a claim sounding in breach of warranty. In any event, this is a petition for certiorari; consequently, even if petitioner should be in error on this point, certiorari should be granted to clarify the status of petitioner and, by implication, all other railroads with respect to circus trains.

I.

The Decision Below Turns Upon an Erroneous Conception of the Qualitative Nature of the Acts to Which Common Carrier Status Attaches.

The basis of the decision by the Court of Appeals is manifest in the text of the opinion where it says:

> "If the appellant Railroad occupied the status of a common carrier subject to the provisions of the Interstate Commerce Act, then it is patent that the spirit and prohibitions of that Act would avoid the provisions of this contract insofar as it provides indemnity for injuries to the Railroad's own employees."

It is likewise manifest that the court reached this conclution upon the basis of a supposed finding of fact that petitioner was a common carrier of circuses, the rules of the Interstate Commerce Commission governing the filing of circus haulage contracts and the findings of fact of the district court. Petitioner has shown that there was no such finding of fact (Petition 10), and that the only find-

ings of fact which might be construed as relative to petitioner's common carrier status, do not indicate common carrier status (Petition 10-12). It was likewise shown that the Interstate Commerce Commission rules actually support the petitioner's position here (Petition 20-23).

In the face of the agreement between the petitioner and the Court of Appeals that this question was controlling, respondent buried his discussion of it in the middle of his fifty-one page brief (Brief 31-41). After there stating the generally accepted principle that "what one does" determines common carrier status, respondent attempts to demonstrate that this record shows petitioner was such a carrier.

Respondent's first argument rests upon the supposed attitude of the Interstate Commerce Commission toward these movements. He begins by citing a statement in a Commission rule that the act applies to the transportation of circuses (Brief 32). He neglects to tell the Court, however, that the rule he is quoting is applicable to motor carriers and that the equivalent rule applicable to railroads does not contain this statement. This was fully explained in the petition (Petition 22) where it was shown that, because of the difference in scope between Part I and Part II of the Interstate Commerce Act, the difference in phraseology indicates that the Commission is of the opinion that private carrier contracts are permissible with respect to circuses under Part I of the Act. In support of his interpretation, respondent also cites *Coma* v. *St. L.-S. F. R. Co.*, 74 I. C. C. 400 (1922), and *Chappelle* v. *L. & N. R. Co.*, 19 I. C. C. 456 (1910). Again, respondent's brief contains no mention of the fact that, because of its rule of decision forbidding the unnecessary consideration of jurisdictional questions, the Commission expressly refused to pass on this question in the *Coma* case. Likewise, respondent fails to comment upon the subsequent pronouncement of the Commission in

Petroleum Rail Shippers' Assn. v. *Alton & S. R.*, 243 I. C. C. 589, 620 (1941), which indicates the present view of the Commission that circuses are hauled by railroads acting as private carriers (Cf. Petition 21-22).

Respondent's other line of argument concerning petitioner's status consists of the citation of a number of cases without any consideration of the nature of the facts involved.

In *Washington ex rel. Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 207 (1927) (Resp. Brief 32) this Court considered an order of the Washington commission compelling the Shively company to charge relator for the movement of logs in Puget Sound according to a general tariff filed with the commission to which the company was a party. In addition to ignoring the fact that a general tariff had been filed, respondent forgets the language of this Court at page 212 of the opinion where the critical facts are set forth:

> "it (Shively) towed logs for others as well as for relator; it held itself out as a common carrier in that line of business, and by the tariff gave public notice to that effect."

Petitioner submits that it is significant that this Court did not stop with the statement that Shively towed logs for others, but felt itself compelled to find a general holding out indicated by the filing of a general tariff, not a specific contract.

More serious misunderstanding could arise from respondent's quotation (Brief 32) from *Mayhew* v. *McFarland*, 153 S. W. (2d) 428, 431 (Tex., 1941). Without indicating the omission, respondent omits a vital phrase from the statement of the rule as to common carrier status; the full quotation is as follows:

> "The rule has long prevailed in this State that all persons who transport goods from place to place for

> hire, *for such persons as see fit to employ them,* whether usually or occasionally, whether as principal or incidental occupation, are common carriers, and incur all their responsibilities" (italics supplied to indicate omitted phrase).

In addition, the opinion indicates that the carrier involved had a certificate from the Texas commission permitting it to engage in the very type of haulage involved and that the defendant had specifically represented himself to the plaintiff as a common carrier of such shipments.

Both *Southern Pacific Co.* v. *Arizona,* 249 U. S. 472 (1919) and *Atchison, T. & S. F. R. Co.* v. *State,* 206 Pac. 252 (Okla., 1922) (Brief 34-35) essentially decide that no constitutional limitation prevents the regulation of intrastate haulage of circuses by a state. The contention in the *Southern Pacific* case that the Arizona commission's order violated the railroad's right to contract as a private carrier was raised under the due process and equal protection clauses of the Constitution. The language quoted by respondent (Brief 34) is with respect to this clause, not the commerce clause; the language omitted by respondent sustains the order because it specifically permitted the railroad to undertake the carriage pursuant to a private carrier contract. The *Atchison, T. & S. F.* case involved the regulation of intrastate rates, admittedly within the power of the state. The Oklahoma constitutional provisions upon which the decision was based made every railroad a public highway, thus imposing an unlimited duty of carriage, and gave the state commission jurisdiction over the performance of such public duties by all "transportation * * * companies." Because of the broader scope of these provisions, the result did not depend upon the distinction between common and private carrier.

Respondent then discusses the *Bernardi* litigation (Brief 36-37). This discussion, however, does not controvert pe-

titioner's analysis of these cases (Petition 18-19). Petitioner does not disagree with the statement quoted (Brief 37) that the defendant in that case did not contract as a carrier, either common or special. However, both opinions rendered in *Bernardi Greater Shows* v. *Boston & M. R. Co.* and reported at 165 Atl. 124 and 1 A. (2d) 360 indicate that this was predicated upon the proposition that the language of a contract is not controlling as to the relationship of the parties. These opinions also indicate that the statement was responsive to the contention that the railroad was merely leasing motive power and a crew to the circus. Following the language quoted by respondent, the court said at page 362 of the second opinion:

> "It seems plain to us that the contract was an agreement for the transportation of the show train as a unit, but it now appears that this was a service outside the scope of the defendant's assumed obligations as a common carrier. We therefore conclude that in making this agreement the defendant contracted as a private carrier to render a service in regard to which the parties 'were free to make their own bargain'."

This is a succinct statement of petitioner's position here.

Ultimately, respondent approaches a correct statement of the applicable law when he says that the lack of evidence is a cardinal distinction in the cases (Brief 37). He fails to explain, however, that the evidence relied upon in this case to sustain a holding that petitioner was a common carrier is qualitatively identical to that rejected in the other authorities. This was fully set out in the petition (Petition 11, 13).

Respondent's second point concerning the validity of the contract is unnecessary (Brief 41-44). It is unquestioned that a common carrier could not validly execute this type of contract; however, all of the authorities cited by respondent are cases involving common carriers. Thus re-

spondent's second point is automatically decided when petitioner's status is determined.

Respondent then attempts to argue that this is an attempt to contract away petitioner's duties under the Safety Appliance Act (45 U. S. C. § 1 *et seq.*). Petitioner's position in this regard is fully stated in the holding of the Court of Appeals:

> "We are not able to follow the learned district judge in holding that, so construed, this is a contract by which the Railroad seeks to exempt itself from liability created by the Federal Employer's Liability Act or the Federal Safety Appliance Act and, hence, void under 45 U. S. C. A. 55. The Railroad did not seek to escape liability to its employee. To the contrary, it settled with him fairly and honorably. The contract, construed as contended for by Appellant Railroad, seems to us to provide for indemnification and not for a limitation of liability."

Finally, respondent raises the immaterial issue of whether or not petitioner inspected this car properly (Brief 47-48). Negligence of the petitioner was not involved in this case. In the first place, as opposed to the conclusion of law, the finding of fact and the record indicate that this was a latent defect, that Hungunin inspected by pulling lightly on the grab iron before he relied upon it, and that the defect was not discovered (R. 63, F. 12, R. 132).[1] Moreover, negligence is not in issue here since liability under the Safety Appliance Act does not depend upon negligence, *Texas & P. Ry. Co.* v. *Rigsby*, 241 U. S. 33 (1916). Additionally, respondent made certain representations concerning, *inter alia*, car 83, and its liability depends upon the breach of these representations, not breach of a duty to inspect. This is contractual and not founded upon tort, *Minneapolis-Moline Co.* v. *Chicago, M., St. P. & P. R. Co.*, 199 F. (2d)

1. The letter referred to was introduced by respondent, not petitioner (R. 124).

725, 731 (C. A. 8th, 1952). Finally, respondent's contention that this agreement would be against public policy is negated by *Booth-Kelly Lumber Co.* v. *Southern Pacific Co.*, 183 F. (2d) 902 (C. A. 9th, 1950). In that case, the court permitted recovery against an industry for injuries to a railroad employee under an indemnity agreement, although the railroad had breached its duty to the employee under the Federal Employers' Liability Act.

II.

The Status of Petitioner as a Special Carrier of Circus Trains Must Be Determined Under the Applicable Federal Decisions.

Respondent contends that the validity of this contract is to be determined under local law, despite the fact that the movement on petitioner's lines was interstate in character. With respect to this issue, the Court of Appeals correctly concluded:

> "Appellant Railroad, in an effort to avoid the unfavorable effect on it of the laws of Wisconsin, and also of Illinois and Texas, as ruled by the District Court, insists that federal law is determinative of this case, that the Railroad is subject to the provisions of the Interstate Commerce Act (49 U. S. C. A. Secs. 1 *et seq.*), that the Carmack Amendment to that Act (49 U. S. C. A. 20 (11)) regulates the carrier's power to limit its liability for the carriage of property in interstate commerce, and manifests such a comprehensive plan that there is no room for state regulation (citing *American Express Co.* v. *United States Horseshoe Company*, 244 U. S. 58; *Adams Express Co.* v. *Croninger*, 226 U. S. 491), and that the case of *Chicago, R. I. & Pac. Ry. Co.* v. *Maucher*, 248 U. S. 359, relied upon by the District Court, is inapplicable. Thus far, we find ourselves in agreement with the appellant Railroad."

Respondent, in omitting any reference to this ruling of the Court of Appeals, manifests a failure to grasp petitioner's contention with respect to the Interstate Commerce Act[2] (Brief 17-18). In summary form, that contention is as follows:

The contract clearly contemplated the movement of respondent's property, the circus train, between three states; hence the movement was one in interstate commerce. Petitioner's normal activities, the haulage of passengers and property in cars and coaches owned by petitioner, bring it within the scope of the Interstate Commerce Act. The Carmack Amendment to that Act (49 U. S. C. § 20(11)) provides certain situations in which a carrier's liability for the transportation of property cannot be limited. In others, it can be limited by permission of the Interstate Commerce Commission. By omission, the act impliedly prescribes the situations in which liability can be limited by the carrier. This manifests such a comprehensive plan regarding these limitations that there is no room for state regulation.

Where such an intent is manifest by Congress, the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), has been held inapplicable to incidental questions which were not specifically covered by the Congressional enactment. In *Francis* v. *Southern Pacific Co.*, 333 U. S. 445 (1948), this Court held, in a diversity of citizenship case, that the Hepburn Act so completely regulated free passes on railroads and the rights of persons riding thereunder that the validity of a release from liability for negligence appearing thereon should be determined by federal law. This same result prevailed in *O'Brien* v. *Western Union Telegraph Co.*, 113 F. (2d) 539, 541 (C. A. 1st, 1940). Likewise *Dice* v. *Akron, Canton & Youngstown R. Co.*, 342 U. S. 359

2. Respondent frequently refers to petitioner's briefs in the Court of Appeals; these are not part of the record here. However, petitioner is compelled to state that many of these references materially misrepresent what was said in the briefs.

(1952), held that the F. E. L. A. had so completely regulated the field of liability for injuries to railroad employees employed in interstate commerce that the validity of a release executed subsequent to the accident was governed by federal, rather than state, law despite the fact that the act itself was silent upon that point. The need for uniformity which was present in those cases is likewise present in this instance. An equally elaborate framework of regulatory legislation has been enacted by Congress. Under these circumstances, the rule contained in the foregoing cases was correctly applied by the Court of Appeals in determining the law governing this case.

Respondent's contention (Brief 19) that *Sasinowski* v. *Boston & M. R. Co.*, 74 F. (2d) 628 (C. A. 1st, 1935), supports its contention as to choice of law is not persuasive. Immediately prior to the language quoted by respondent, the court notes that the district court held that the contract was valid under either Massachusetts or federal law. What the court actually decided was that New Hampshire law was not involved. Moreover, had the court followed the principle contended for by respondent, it would have held that it was bound by the applicable Massachusetts decision which was squarely in point. Instead, however, it held that railroads were not common carriers of circuses as a matter of general law, citing a number of decisions including those relied on by petitioner. It omitted the governing Massachusetts decision from this list.

III.

If the Contract Is Valid, Petitioner Is Entitled to Recover Since Hugunin's Injuries Were Within the Scope of the Indemnity Clause and Respondent Breached Its Warranty Concerning Car No. 83.

In setting out the pertinent portions of Section 6 of the contract involved, respondent, without so indicating,

omitted one crucial phrase; the fifth line on page 22 of respondent's brief should read:

> "nor to any person or persons, for any injury or damage which may happen to any persons, cars or property * * *"

The entire Section 6 appears in appendix B of the petition. With omissions to show only the parts material to this question, it reads:

> "* * * the conductors, engineers, *trainmen, and other* officials, agents or *employees furnished by said railroad company hereunder shall, for all purposes of this contract, while engaged in such employment, be deemed to be the servants of the party of the second part* (the circus) * * * party of the second part * * * agrees that the *said railway company shall not be liable to* * * * *any person* or persons, *for any injury* or damage which may happen *to any persons* * * * (who) * * * otherwise may be *upon said train or upon the railway company's premises* * * * *arising from any cause whatsoever.* Party of the second part hereby further covenants and agrees to protect, indemnify and forever hold free and harmless the said party of the first part from any and all liability, loss, judgments, costs and expenses whatsoever, arising from or in connection with claims or suits for damages on account of any such injury or damage" (emphasis supplied).

By reading section 6 as a whole, no ambiguity exists. The provision that the railroad's employees shall be deemed the employees of the circus while working on this train places railroad employees in such circumstances in the same status as circus employees. Had a circus employee been injured in this manner, the indemnification provisions in this section would have been applicable. But the circus could not release its employees' actions against the railroad. Plainly the circus intended to indemnify the railroad against actions by circus employees, and the effect of this adoption of railroad employees by the circus is to place them in the same position.

This, then, was an accident to a person who was on the railroad's property in connection with the business of the circus and who was on the train at the time of the accident. A defective grab-iron was within the scope of the comprehensive provision.

Although it did not pass on the construction involved, the Court of Appeals was persuaded by this line of reasoning when it said:

> "However, the contract does provide that the Railroad's employees shall be deemed the employees of the Circus while working on the Circus' train, and, for purposes of this decision, we will assume that it is broad enough to provide for indemnity for damages paid on account of injuries suffered by the Railroad's own employees. * * *"

Alternatively, petitioner declared upon breach of warranty in its complaint (Complaint, pars. 9-12; R. 5), despite respondent's contrary assertions (Brief 3, 30). Petitioner submits that respondent has presented nothing which indicates that recovery would not be justified on this theory which was outlined at page 24 of the petition. Respondent's claim that petitioner did not ask damages is negated by the fact that, as soon as the damages became liquidated by the payment to Hungunin, petitioner amended its complaint to include a prayer for the recovery of such damages (R. 37).

However, this is a petition for certiorari. Such petitions are not supposed to be briefs on the merits; they should be limited to the reasons why the writ should be granted. The reasons in this case involve the question of whether petitioner and, by implication, every railroad in the country, is a common carrier of circus trains. Although petitioner earnestly contends that the liability of respondent is so clear under the contract that this Court should incidentally determine that question, in the event this Court should

determine otherwise, the importance of the basis of decision of the Court of Appeals is such that certiorari should be granted, the status of petitioner determined in this forum, and the cause remanded to the Court of Appeals to pass upon the construction of the contract.

Conclusion.

For the above and foregoing reasons, respondent's lengthy brief in opposition has failed to show that the decision of the Court of Appeals that petitioner was a common carrier of circus trains was clearly correct and not in conflict with the decisions of other circuits. Respondent has tacitly admitted that the resolution of that question by this Court is important to both the railroad and circus industries. Therefore, the writ of certiorari herein prayed for should issue.

Respectfully submitted,

DRENNAN J. SLATER,
400 West Madison Street,
Chicago 6, Illinois,

AMOS M. MATHEWS,
The Association of Western Railways,
280 Union Station Bldg.,
Chicago 6, Illinois,

ARTHUR P. BAGBY,
J. SAM WINTERS,
Brown Building,
Austin, Texas,
Attorneys for Petitioner.

GERALD M. CHAPMAN,
Of Counsel.